SUPREME COURT, U. S.

OCT 2 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 598.

ATLAS ENGINE WORKS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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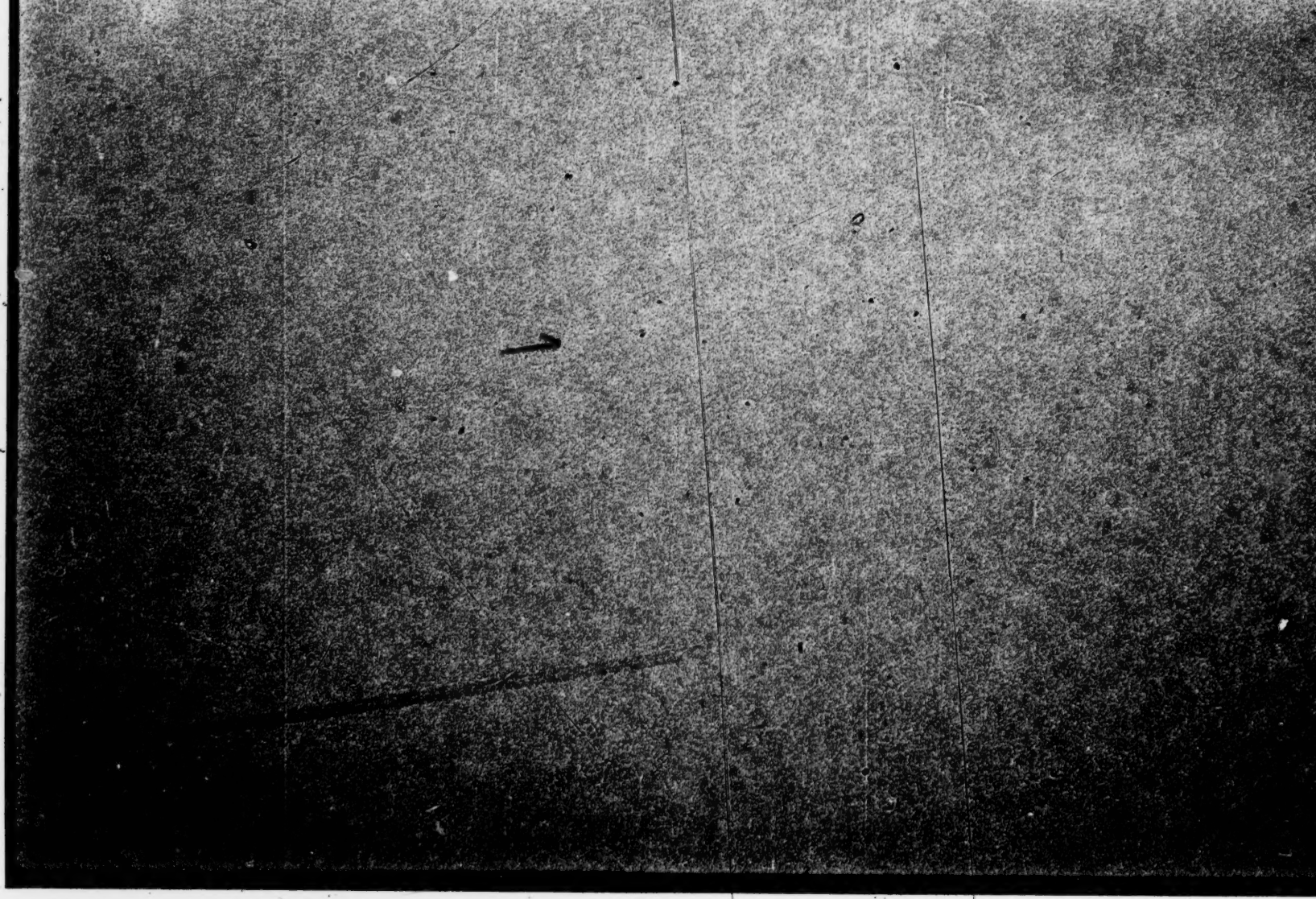

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner, Atlas Engine Works, Inc., petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit denying a petition for review and enforcing an order of the National Labor Relations Board.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 1a-3a) has not yet been reported officially. The decision and order of the National Labor Relations Board (Appendix C, *infra,* pp. 4a-5a: J.A. 26-61),[1] including the Trial Examiner's Decision (Appendix D, *infra,* pp. 5a-68a: J.A. 26-59), are reported at 163 NLRB No. 61.

[1] "J.A." refers to the Joint Appendix in the Court of Appeals.

JURISDICTION.

The opinion of the Court of Appeals for the Sixth Circuit was entered on June 28, 1968, and a timely petition for rehearing and a suggestion for a rehearing en banc were denied on August 13, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court below properly held, by emphasizing the language on the face of authorization cards, that they were valid designations of a union as bargaining representative despite the fact that the signatory employees were told by their card solicitors that the cards would be used to obtain a Board representation election, no other purpose being disclosed by the solicitors, and the signatory employees signed because they believed that the cards would serve only that function or the signatory employees heard that the purpose of the cards was to have an election and signed on that basis.

2. Whether the Court below properly held that an employer did not have a good faith doubt of a union's majority where the holding was based only on the employer's opposition to union organization and its failure to state its doubt as to the union's majority claim or comment on the union's card check proffer in its campaign meetings or in its written reply to the union's demand for recognition, even though the employer had received similar demands in the two preceding years from different unions, the first thereafter having lost a Board conducted election and the second having failed to muster a 30% showing of interest amongst its employees to entitle the union to a Board conducted election and even though the employer in its campaign in opposition to the union took precautions

to insure that its employees' rights under the National Labor Relations Act were fully protected by instructing its supervisors in writing about those rights and by insuring that all of its communications to employees were free of any unfair comment.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, et seq., are set forth in Appendix E, *infra*, pp. 69a-71a.

STATEMENT OF THE CASE.

In this case, the Court of Appeals for the Sixth Circuit sustained a decision and order of the National Labor Relations Board in which the Board found that Atlas had committed certain unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (hereinafter called "the Act") and had refused to recognize and bargain with Local No. 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called "the Union" or "Teamsters Local Union No. 20" or "Local Union No. 20") in violation of Section 8(a)(5) of the Act.

A. THE FACTS.

1. Recent Union Organizational Activity at Atlas' Plant.

Attempts to organize the production and maintenance employees at Atlas' plant in the two years immediately preceding the campaign in this case were made by the Mechanics Educational Society of America (hereinafter called "MESA") in 1963, and the United Steel Workers of America (hereinafter called "the Steelworkers") in 1964. In both those organizational attempts the unions

conducted campaigns which included handbilling, and thereafter submitted to Petitioner their written demands for recognition (J.A. 732-736). In 1963, MESA lost an NLRB conducted election (J.A. 736). In 1964, the Steelworkers, after claiming a majority, demanding recognition and later filing a petition for representation with the Board, could not muster sufficient support among Atlas' employees to meet the 30% showing of interest required by the Board to entitle it to a representation election (J.A. 733).

2. Teamsters Local Union No. 20's 1965 Organizational Campaign.

The Union's organizing campaign for Atlas' 169 employee unit began with an organizational committee meeting on June 9, 1965, attended by two of Atlas' employees as well as a Union Business Agent (J.A. 576-577). Subsequent organizational committee meetings of employees very active in the campaign and the solicitation of cards were held on June 16, 22 and 28 and July 8, 28 and 31 (J.A. 576-579, 582). General meetings open to all employees of Atlas were held by the Union on July 7, 11, 14 and 25 (J.A. 577, 579, 580, 581-582). According to a Union Business Agent, the maximum number of employees in attendance at any of these meetings was approximately 63 on July 11, 1965 (J.A. 580). At the two later meetings attendance dropped (J.A. 581-582). An employee who attended the July 11 meeting estimated the number of employees present to be roughly 20 to 25 (J.A. 666).

Union handbilling occurred on July 8, 13, 21, 27, and August 2, 1965 (J.A. 582). Visits to the plant by Union representatives were made on August 3, 4 and 5 (J.A. 582-583). At least one letter was mailed by the Union to all employees on August 3, 1965 (J.A. 783-784, 923-924).

3. The Union's Demand for Recognition and Atlas' Rejection Thereof.

On Thursday, July 15, 1965, only seven days after its first handbilling, Teamsters Local Union No. 20, through a Business Agent, claiming authorization cards from a majority of the employees, orally demanded recognition in a telephone conversation with Atlas' Personnel Director, Harold C. Warner (J.A. 582). On the following day Atlas received a written demand for recognition (J.A. 731-732, 881).

In the afternoon of July 16, 1965, after receiving the Union's written demand for recognition, President Clark and Personnel Director Warner met and discussed the question of recognizing the Union on the basis of its written demand. They decided that they could not honor the Union's demand because of their experience with prior organizational campaigns, because they had been informed that certain employees had been threatened and others had been the objects of misrepresentation as to the purpose of the cards, and finally because of their experience and knowledge that authorization cards did not represent the true desires of their employees (J.A. 427, 738-744, 877-880). Atlas denied recognition the following Monday, July 19, 1965, acknowledging the right of its employees to "join or refrain from joining unions" and offering its full cooperation in a Board-conducted election, a position it had taken in the prior two campaigns (J.A. 882).

Local Union No. 20 did not at the time of its demand nor thereafter endeavor to prove its claim that a majority of Atlas' employees had signed cards intending to designate it as their bargaining agent.

4. Local Union No. 20's Claimed Majority Status.

Teamsters Local Union No. 20's organizing campaign included the mass distribution of authorization cards through the mails and at organizational meetings, and the individual solicitation of employees through card solicitors. During the individual solicitations many employees were told that the cards were necessary to secure a Board-conducted election (J.A. 83-86, 108-114, 153-157, 190-196, 451-453, 143-147, 511, 898, 176-177, 608-609, 536, 541, 719-720, 613, 299).

However, the attention of this Court is directed only to the circumstances underlying the card solicitations of five signatory employees, all of whom testified that they were told or heard that the cards were to be used for a Board-conducted election, that it was their understanding that the cards were only to be used to obtain such an election and that they signed only on that basis[2] (J.A. 83-86, 108-115, 129-143, 143-147, 190-196).

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[2] Employee Dale Stein testified that before he signed his card his solicitor told him that his card was for a Board-conducted election and that was "the understanding" (that he) took it on" (J.A. 83-86). Employee Lillian Sleek testified that her husband asked her several times to sign and she refused. Her husband then told her that the card would be used to permit the Union "to come in for an election." She said she signed only for that reason and did not understand even after reading the card that she "accepted membership in the Teamsters Union" (J.A. 190-196). Gregory Boltman testified that he signed because of talk in the plant that there would be an election and also because his solicitor told him it was unnecessary to sign a card and if the "Union had enough cards, we would have a vote." He then told his solicitor he would sign to have a vote (J.A. 108-115). Gerland Fritz, after being pestered by card solicitors and being asked to sign several times, testified that he signed to have an election after being told by solicitors that such was the purpose of the card (J.A. 143-147). Dwayne Claybaugh stated that he signed his authorization card under the impression that it was for an NLRB election because of his past experience in 1963 when MESA solicited cards and thereafter attempted to gain recog-

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B. PROCEEDINGS BEFORE TRIAL EXAMINER.

The Complaint against Petitioner was issued on November 4, 1965. It was amended on November 16, 1965, to include allegations charging Petitioner with the failure to recognize and bargain with the Union in violation of Section 8(a)(5) of the Act (J.A. 5-13). A hearing was held before a Trial Examiner at Fremont, Ohio, on various dates beginning January 19, 1966, and ending February 9, 1966. The Examiner's Decision was issued September 14, 1966 (J.A. 26-59).

C. THE BOARD'S DECISION AND ORDER.

On March 20, 1967, a three-member panel of the Board adopted the Examiner's findings of fact, conclusions and recommendations (J.A. 60-61). The Board found, in adopting in total the Examiner's Decision (1) that Atlas violated Section 8(a)(1) of the Act by unlawfully permitting certain non-supervisory employees to attend its campaign meetings and permitting them to ask questions of employees as to their Union feelings,[3] by classifying its employees during those meetings (as pro-union, pro-com-

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nition through a Board-conducted election. He assumed that Local Union No. 20 would follow the same procedure (J.A. 129-143). When he heard the speech given by Personnel Director Warner on July 14, during which Warner erroneously stressed that the employees had signed membership cards in the Union, Claybaugh immediately sent in a written resignation (J.A. 138-139). The revocation, plus Claybaugh's testimony, is convincing evidence that this employee's intent was not to join the Union when he signed the card.

[3] Five non-supervisory employees attended either one or two of the campaign meetings scheduled by Atlas on July 16, 21 and 28. Three were former supervisors. One was then Atlas' master mechanic. The fifth was a stockroom clerk who had then recently been in a dispute with the Union's principal card solicitor and several other union supporters and wanted to assist Atlas. All attended of their own free will (J.A. 32-33).

pany or undecided) in an effort to gauge the effectiveness of its campaign,[4] by unlawfully promulgating a no-solicitation no-distribution rule,[5] by unlawfully questioning its employees,[6] by discussing a possible promotion,[7] and by threatening its employees with reprisals;[8] and

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[4] During each of the three meetings the payroll list was read and those present were asked to register their opinion as to whether an employee was pro-Company, pro-Union or undecided (J.A. 745-746, 754-756, 771-772). This canvassing was done by Atlas to gauge the effectiveness of its campaign and not for the purpose of discriminating against any employee.

[5] The Board found that Atlas had in effect an impermissible rule prohibiting the distribution of literature on Company premises without prior approval (J.A. 35-36). It also found that a modifying notice posted on July 22, 1965, prohibiting the distribution of Union material or the conducting of Union solicitations during normal working hours was improper because it was done to curb the Union's campaign (J.A. 35-36). The Board did not consider Atlas' concern over its production as sufficient justification for this notice (J.A. 267, 344, 877-878).

[6] These questions involved some 11 employees and extended over a period of approximately four and one-half months. The questions were not coupled with reprisals, were a part of brief conversations and consisted of the employee's feelings toward inquiries directed to the Union or his thoughts as to how he was going to vote in the election and the like (See, e.g., J.A. 40, 303, 345-346, 514-515, 528-539, 546, 795-796).

[7] This discussion involved Atlas' President Clark and principal union adherent Frank Ruiz. It occurred after a speech made to assembled employees by Clark on July 10. After the speech Ruiz sought out Clark and pressed on him his union position. The two discussed production quotas and advancement, with Clark stating that a vacancy in Atlas' foremen's ranks might be filled by Ruiz (J.A. 432-433).

[8] Inspector-leadman Ralph Cogar told employee John Ford that he might lose his overtime if the Union "came in" (J.A. 43-44). Methods and Time Study Supervisor Halstead told employee Rosemarie Murray that she might have to start making house payments from an unemployment check (J.A. 42). Foreman Shively told principal union adherent Ruiz during an argument that bargaining might start from scratch and that a company could go under because of high labor costs (J.A. 42-43). Cogar also told employee Daniel Nagy that a union might affect wages and force a plant to close (J.A. 43). Toolmaker George Busch told employee Sabo that he might lose his right to ap-

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(2) that Atlas refused to recognize and bargain with the Union, thereby violating Section 8(a)(5) of the Act because 88 of its 169 employees in the bargaining unit, a majority of three, had validly designated the Union as their bargaining agent by signing and delivering to the Union authorization cards by the time the Union had demanded recognition and because Atlas' campaign in opposition to the Union coupled with its subsequent unfair labor practices gave rise to the inference that its initial refusal to recognize and bargain was not made in good faith (J.A. 54-55).

In deciding that the Union possessed a majority of valid authorization cards, the Board followed its rule established in *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced 351 F.2d 917 (6th Cir. 1965), wherein it held that a card may be invalidated only if the card solicitor actively misrepresents to the signer and states, using the words "sole" or "only," that the purpose of the card is to get an election (J.A. 46-54). In adhering to its *Cumberland Shoe* rule, the Board rejected Atlas' argument that a number of employees had signed cards to permit the Union to obtain a Board-conducted election in which its majority status would be determined (J.A. 46-54). The Board ordered Atlas to cease and desist from violating Section 8(a)(1) of the Act and to recognize and bargain with the Union upon request (J.A. 57-58).

D. THE DECISION OF THE COURT OF APPEALS.

The court below enforced the Board's order. In sustaining the Board's finding that the Union possessed a majority of valid authorization cards because the card

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prenticeship school because of the Union (J.A. 43). The above statements were all contrary to explicit written and oral instructions from Personnel Director Warner and were made without his knowledge.

solicitors had told the signers that the "sole" purpose of the cards was to obtain a Board-conducted election, the Court, speaking through Judge Phillips, emphasized (1) that the language on the authorization cards was unambiguous (Appendix A, *infra*, p. 1a);[9] (2) that Atlas' Personnel Director had spoken to both shifts of its employees on July 14, 1965, and had warned them albeit erroneously, that they were signing membership cards (Appendix A, *infra*, p. 2a);[10] and (3) that a Union business agent had told employees who attended two organizational meetings that one of the purposes of the cards was to permit the Union to gain recognition (Appendix A, *infra*, p. 2a).[11]

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[9] Language on the cards read:

TEAMSTERS LOCAL 20 ORGANIZING COMMITTEE
Affiliated with the I. B. of T., Ch., W. & H. Of Am.

I HEREBY ACCEPT MEMBERSHIP IN TEAMSTER LOCAL NO. 20, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and of my own free will hereby authorize the above union to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment.

Employed by _____
City State
_____ _____
Home Telephone PRINT NAME
_____
Class of work Hrly Rate Home Address Zone
Social Security Number _____
SIGNATURE _____ Date _____

THINK UNION—TALK UNION—BE UNION

[10] This speech was made after all the cards whose validity was and is questioned were signed! The speech therefore could have in no way operated to dispel the effect of any of the statements made by the solicitors.

[11] General Counsel made no showing that any of the employees excepting Dwayne Clabaugh, the validity of whose card is being questioned, ever attended either of the two meetings. Of course, employees who signed cards before the two meetings derived no benefits from such statements as to the meaning of their cards.

The Board's finding that Atlas refused to recognize and bargain with the Union in good faith was also sustained by the Court, Judge Phillips restating with favor the Board's finding that Atlas refused to recognize and bargain because it wanted time to institute its "systematic campaign to prevent collective bargaining" (Appendix A, *infra*, p. 3a).

Finally, the Court sustained the Board's finding that a bargaining order was warranted because the "dissipation of the Union's majority" was caused by Atlas' unfair labor practices (Appendix A, *infra*, p. 3a).

REASONS FOR GRANTING WRIT.

A. In recent years, the Board by greatly expanding its use of the bargaining order as an unfair labor practice remedy, has made the question of under what circumstances a union's representative status may be predicated on authorization cards instead of a Board-conducted election an important one in its administration of the Act.[12]

In order to safeguard the fundamental right of employees to choose as well as to refrain from choosing a union as bargaining agent and to insure that a union is

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[12] In 1964, the Board overruled a prior decision, *Aiello Dairy Farms*, 110 NLRB 1365 (1954), and reannounced a rule permitting a union to proceed through a representation election, lose the election and thereafter seek to obtain a status as bargaining agent by relying on unfair labor practice charges grounded on employer pre-election conduct, *Bernel Foam Products, Inc.*, 146 NLRB 1277 (1964). The *Aiello* rule was that once a union elected to proceed to a representation election instead of filing charges directed to the employer conduct before the election, the union was thereafter precluded from seeking bargaining agent status. A commentator has noted that there were perhaps a dozen such *Bernel Foam* type cases in 1964, twice as many in 1965 and approximately 117 in 1966. Lesnick, Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851, at 851.

not imposed upon them against their will, the question of whether the bargaining union has ever enjoyed a majority among the employees becomes of paramount importance.

A union ordinarily attempts to establish its majority by using authorization cards which are distributed to the employees, signed by them and then returned to the union.[13] If these cards are to be substituted for secret ballots cast in a voting booth by employees who know they are voting to choose or not to choose a union as bargaining agent, adequate standards must be established to insure that employees, by signing such cards, clearly intend by signing to authorize the union to act as collective bargaining agent or accept membership in the union.

The Board's position is that where a card on its face clearly declares a purpose to designate the union as bargaining agent it will be invalidated only if the signatory employee is coerced or is told that the "sole" or "only" purpose of the card is to obtain a Board-conducted election. *Cumberland Shoe Corp., supra; Levi Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338 (1968); *McEwen Manufacturing Co.*, 172 NLRB No. 99, 68 LRRM 1343 (1968). The Board has repeatedly held that it is not enough to show that the solicitor discussed the possibility of an election, telling the signer that it was for that purpose and even though there is testimony that the employee signed on that

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[13] To determine if further election proceedings are warranted, the Board has established an administrative requirement that a union petitioning the Board for a representation election must support its petition by a showing that thirty percent of the employees in the bargaining unit petitioned for desire the union to be their bargaining agent. The Act makes no requirement as to the form of evidence to make this showing. The Board prefers authorization cards signed and dated at the time they are signed.

basis. See, e.g., *Sandy's Stores, Inc.*, 163 NLRB No. 95, CCH LC ¶ 21,210 (1967); *Yazoo Valley Electric Power Ass'n*, 163 NLRB No. 106, 65 LRRM 1030 (1967); *Brandenburg Telephone Co.*, 164 NLRB No. 26, CCH LC ¶ 21,376 (1967); *Levi Strauss Co., supra; McEwen Manufacturing Co., supra.*

As to the effect of testimony reflecting signer's intent, the Board has often relied upon the dictum in *Joy Silk Mills v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), cert. denied, 341 U.S. 914, 71 S. Ct. 734, 95 L. Ed. 1350 (1951), wherein the court said:

> "An employee's thoughts (or after thoughts) as to why he signed a union card, and what he thought the card meant, cannot negative the overt act of having signed a card designating a union as bargaining agent." 185 F.2d at 743.[14]

The Board's standards have come under sharp criticism from commentators and reviewing courts alike, creating a sharp conflict between those two circuits up-

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[14] The Board has most recently said: "Nor are we able to subscribe to the dictum expressed in one recent court case, [*Engineers & Fabricators, Inc. v. NLRB*, 376 F. 2d 482, 64 LRRM 2849 (5th Cir. 1967)] that when cards are 'challenged because of alleged misrepresentations in their procurement,' the Board must probe 'into the subjective intent of the challenged signers.' Such a standard is at odds with a long line of judicial authority holding that, in the absence of clear proof of fraud or coercion, full effect must be given a clear authorization card regardless of the subjective state of mind of the signer. As stated by the court in the *Joy Silk Mills* case, "an employee's thoughts (or after thoughts) as to why he signed a union card and what he thought that card meant cannot negative the overt action of having signed a card * * *.' To open up avenues of proof of subjective intent would create strong temptations for employers to induce employees to assert a retroactive disavowal, and such testimony would not be subject to the normal evidentiary checks on truth or falsity." *Levi Strauss & Co., supra*, 68 LRRM 1343.

holding the Board's standards and those several circuits which view the Board's standards as unrealistic.[15]

Two circuits, the First and the District of Columbia Circuit, have approved the Board's standards, the latter court stating that they were ones of convenience. *NLRB v. Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851, 855-856 (1st Cir. 1967); *United Automobile Workers v. NLRB (Preston Products Co.)*, ____ F. 2d __, 68 LRRM 2548, 2552-2553 (D.C. Cir. 1967); *United Automobile Workers v. NLRB (Aero Corp.)*, 363 F. 2d 702, 705-706 (D.C. Cir. 1966); cert. denied, 385 U.S. 973 (1966).

Two circuits, the Fourth and the Fifth, have flatly rejected them. *Crawford Mfg. Co. v. NLRB, infra,* at pp. 370-373; *Engineers & Fabricators, Inc. v. NLRB, supra,* at pp. 774-777; *NLRB v. Lake Butler, infra,* at pp. 80-82; *NLRB v. Southland Paint Co., supra,* at pp. 723-732.

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[15] *Lesnick, Establishment of Bargaining Rights Without an NLRB Election,* 65 Mich. L. Rev. 851 (1967); *Comment, Union Authorization Cards,* 75 Yale L.J., 805 (1966); *Note,* 33 U. Chi. L. Rev. 387 (1966); *Lewis, The Use and Abuse of Authorization Cards in Determining Union Majority,* 16 Lab. L.J. 434 (1965); *Loomis, Determination of Union Majority Status,* 47 Chi. Bar Record 113 (1965); *Sandler, Another Worry for Employers, U. S. News & World Report,* March 15, 1965, p. 86; *Shuman, Requiring a Union to Demonstrate Its Majority Status by Means of an Election Becomes Riskier,* 16 Lab. L.J. 426 (1965); *Crawford Mfg. Co. v. NLRB,* 386 F. 2d 367 (4th Cir. 1967); *Engineers & Fabricators, Inc. v. NLRB, supra; NLRB v. Lake Butler,* 392 F. 2d 76 (5th Cir. 1968); *Southland Paint v. NLRB,* ____ F. 2d ____, 68 LRRM 2169 (5th Cir. 1968); *Bauer Welding and Metal Fabricators, Inc. v. NLRB,* 358 F. 2d 766 (8th Cir. 1966); *NLRB v. S. E. Nichols Co.,* 380 F. 2d 438 (2nd Cir. 1967); *Golub v. NLRB,* 388 F. 2d 921 (2nd Cir. 1967); *NLRB v. Dan Howard,* 390 F. 2d 304 (7th Cir. 1968).

Considerable discord has also occurred within individual circuits. See, e.g., *Crawford Mfg. Co. v. NLRB, supra* (J. Sobeloff dissenting); *NLRB v. Sehon Stevenson Co.,* 386 F. 2d 551 (4th Cir. 1967) (J. Sobeloff concurring); *NLRB v. Gotham Shoe Mfg. Co.,* 359 F. 2d 684 (2nd Cir. 1966) (J. Timbers dissenting); *NLRB v. Golub Corp., supra* (J. Hays dissenting); *Bryant Chucking Grinder Co. v. NLRB,* 389 F. 2d 565 (2nd Cir. 1967), (J. Friendly concurring, J. Anderson dissenting).

The Eighth Circuit has also very likely rejected the Board's standards. *Bauer Welding and Metal Fabricators v. NLRB, supra,* at pp. 774-777. As to testimony regarding employees' intent, the Court in contrast to the Board said:

> "The Board objects to the admission of such testimony on the basis of language to which we lend approval in *Colson Corp. v. NLRB, supra,* at page 135 of 347 F. 2d, wherein we acknowledge that an employee's after-thoughts as to why he signed a union authorization card could not negate his overt action of having signed the card. There can be no doubt that this is the general rule without misrepresentation being present. Misrepresentation, however, is present herein to the extent that petitioner's employees relied on the letter and believed that they were only showing a desire to have an election by signing the cards. Without this qualification, a union could be blatantly guilty of the most flagrant misrepresentation and be protected through the disallowance of any employee's testimony, once the employee signed the authorization card." Id. at 775.

Two other circuits, the Second and the Seventh, have qualified earlier decisions approving the Board's standards and in more recent decisions have refused to enforce bargaining orders predicated in part on those standards. *NLRB v. Gotham Shoe Mfg. Co., supra,* at pp. 684-686, qualified by *NLRB v. S. E. Nichols Co., supra,* at pp. 442-445 and *NLRB v. Golub Corp., supra,* at pp. 922-924. *Happach v. NLRB,* 353 F. 2d 629 (7th Cir. 1965) and *NLRB v. Glasgow Co.,* 356 F. 2d 476 (7th Cir. 1966), qualified by *NLRB v. Dan Howard Mfg. Co., supra,* at pp. 308-309.

The Sixth Circuit likewise recently reinterpreted and qualified a previous decision approving the Board's standards. *NLRB v. Cumberland Shoe Corp., supra,* qualified by

NLRB v. Swan Super Cleaners, 384 F. 2d 609, 618-620 (6th Cir. 1967). The court, limiting its consideration to the validity of cards of four signers, who testified that they signed their cards only to obtain an NLRB election, stressed that cards would be invalidated regardless of the style of the solicitations if the solicitations in their total context persuade signers that they were not joining a union or designating it as their bargaining agent.[16]

The opinion in the instant case is in direct conflict with *Swan Super Cleaners, supra,* at pp. 618-620. By affirming the Board's application of a standard requiring the exact use of the words "sole" or "only" before a misrepresentation as to the purpose of a card would invalidate it (J.A. 46-49), the Court in effect reverted to a "mechanistic interpretation" of *Cumberland Shoe* which was rejected in *Swan Super Cleaners.*

In its petition for certiorari in *NLRB v. Crawford Mfg. Co., supra,* the Board requested this Court to grant certiorari because of the divergent positions now existing among the several circuits for assessing the validity of cards. The sharp conflict among the circuits, as well as the conflict within the Sixth Circuit itself caused by this case, coupled with the importance of the issue involved, makes this case a most appropriate one for this Court on which to express its opinion and thus resolve the question of standards for determining the validity of cards.

B. The issue of good faith also has been extensively litigated before the Board and on appeal before the various circuits, again resulting in conflicts among the circuits as to what standards are proper measures to determine its "presence or absence."

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[16] One of the four cards involved was clearly couched in terms of membership language similar to the cards in this case.

The Board has consistently held that independent 8(a)(1) violations are strong evidence of an employer's bad faith.[17]

An immediate campaign by an employer in opposition to a union when it learns of a union's organizational activities is likewise considered by the Board to be important factual support for a finding of bad faith.[18]

The Board also considers an employer's failure to submit to a third party check of the cards or its failure to comment on a union's offer of such a check as evidence of bad faith.[19] Such will be the consideration by the Board

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[17] See, e.g., *Peoples Service Drug Stores, Inc.*, 154 NLRB No. 118 (1965), reversed 375 F. 2d 557 (6th Cir. 1967); *Lane Drug Co.*, 160 NLRB No. 86 (1966), reversed 391 F. 2d 812 (6th Cir. 1968); *River Togs, Inc.*, 160 NLRB No. 2 (1966), reversed 382 F. 2d 198 (2nd Cir. 1967); *Preston Products Co., Inc.*, 158 NLRB 322 (1966), enforced ____ F. 2d ____ (D.C. Cir. 1967). Reviewing courts have generally refused to accept this rationale. "Unfair labor practices have a tendency to prove only the employer's opposition to the union's organizational effort; they throw no light on his belief or disbelief of the union's claim of majority status." *NLRB v. Logan Packing Co.*, 386 F. 2d 562, 568 (4th Cir. 1967). Accord: *Benson Veneer Co. v. NLRB*, ____ F. 2d ____, 68 LRRM 2692 (4th Cir. 1968); *Peoples Service Drug Stores, Inc. v. NLRB, supra; Lane Drug Co. v. NLRB, supra; NLRB v. River Togs, Inc., supra; Textile Workers Union of America v. NLRB*, 386 F. 2d 790 (2nd Cir. 1967); *Edward Fields, Inc. v. NLRB*, 325 F. 2d 754 (2nd Cir. 1963).

[18] See, e.g., *Security Plating Co.*, 147 NLRB 877 (1964), enforced 356 F. 2d 725 (9th Cir. 1966); *Overnite Transportation Co.*, 129 NLRB 261 (1960), enforced 308 F. 2d 284 (4th Cir. 1962). Again reviewing courts recently have not found such rationale persuasive. Efforts to counter a union are "as consistent with a desire to prevent the acquisition of majoriy status as with a purpose to destroy an existing majority." *NLRB v. River Togs, Inc.*, 382 F. 2d 198, 207 (2nd Cir. 1967). Accord: *Peoples Service Drug Stores, Inc. v. NLRB, supra; NLRB v. Logan Packing Co., supra; NLRB v. Ben Duthler, Inc.*, ____ F. 2d ____, 68 LRRM 2324 (6th Cir. 1968).

[19] See, e.g., *Madison Brass Works*, 161 NLRB No. 104 (1966), enforced 381 F. 2d 854 (7th Cir. 1967).

The Second Circuit, however, has said:

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only if there is an affirmative showing of bad faith. Otherwise, an employer will not be held to have violated his bargaining obligation because he refuses to rely on cards. *Aaron Brothers Company of California,* 158 NLRB 1077 (1966); *Cameo Lingerie, Inc.,* 148 NLRB 535 (1964); *H. & W. Construction,* 161 NLRB No. 77 (1966); *John P. Serpa, Inc.,* 155 NLRB 99 (1965), reversed 376 F. 2d 187 (9th Cir. 1967).

In affirming the Board's determination that Atlas denied the Union's demand for recognition in bad faith because Atlas (1) was opposed to the Union, (2) failed to comment on the Union's card check proffer during its first campaign meeting with supervisors held that day and in its written reply to the Union's demand, and (3) thereafter committed several unfair labor practices, the court below reached a conclusion which is at odds with other recent decisions within the same circuit and is also in conflict with decisions in other circuits.[20]

Atlas' decision to reject the Union's demand was in major part grounded on its own past experience during the

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"There is equally little force in the union's argument that an employer cannot be held to have a good faith doubt when he rejects an offer allowing him to examine authorization cards or to have a disinterested person do so. There is no need to cite the many cases in this court and others where a union with a majority of authentic cards has been found to lack a valid majority. Yet examination of the cards goes to only one element necessary to the union's majority status; it shows nothing on the equally important factor of how the cards were obtained." *Textile Workers Union of America v. NLRB, supra,* 386 F.2d, at p. 793. See also, *Lane Drug Co. v. NLRB, supra.*

[20] Since an employer has a right before the Board to refuse recognition of a union based on cards unless there is an affirmative showing of bad faith, in essence the Board's finding of bad faith was predicated on Atlas' campaign in opposition to the union and the commission of unfair labor practices. As was demonstrated, supra, footnotes 18 and 19, such findings do not necessarily support a determination of bad faith.

two years immediately preceding the demand when unions had claimed majorities and thereafter had either lost an election or failed even to meet the Board's thirty percent showing of interest requirement to warrant an election (J.A. 732-736). Thus, the Court below reached a conclusion inconsistent with holdings of other circuits and those of the Sixth Circuit itself. Such past experience "is a factor which must be considered in determining good faith." *Peoples Service Drug Stores, Inc. v. NLRB, supra,* at p. 557.[21]

The decision reached in this case is most notably at odds with recent decisions in the Fourth Circuit which hold that an employer may reject a union's demand based on cards alone and be presumed to have had a good faith doubt unless there is other affirmative evidence of the

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[21] Accord: *Textile Workers Union of America, supra,* at p. 793; *NLRB v. Johnnies Poultry Co.,* 344 F. 2d 617 (8th Cir. 1965); *Lane Drug Co. v. NLRB, supra; NLRB v. Ben Duthler, Inc., supra.* Moreover, a factual determination of bad faith can be made only if all facts are examined. *Peoples Service Drug Stores, Inc. v. NLRB, supra,* at p. 556. See also, *Lane Drug Co. v. NLRB, supra; NLRB v. Ben Duthler, supra.* The following facts were present in this case. Two unions, Local Union No. 20 and the Steelworkers, were active in organizing Petitioner's employees at the same time in June of 1965 (J.A. 292-293, 405-406, 549, 653-654). Local No. 20's demand for recognition came within only three days after the second handbill was passed out. Atlas' Personnel Director testified that he did not think the Union was serious in its organizing campaign until the second handbill (J.A. 582, 731-732). Atlas filed its own representation petition within five days after receiving the Union's demand, consented to a Board-conducted election four days after being contacted by the Board agent who was processing the election, and agreed to an election which was held only eleven days thereafter (J.A. 736-737, 748, 756-769). Atlas took care to inform its employees as to their rights under the Act, distributed to its supervisors written instructions designed to prevent illegal statements, and had its speeches to its employees edited by Labor Relations counsel in order that they would be free from any unfair comment. There is no evidence that Atlas knew of any unfair labor practices committed by its foreman or others between the time of the Union's demand for recognition and the election (J.A. 802, 879-880).

union's majority known to him. *NLRB v. Logan Packing, supra,* at p. 566.[22]

Thus, this Court should undertake to review the issue of an employer's good faith doubt, not only because of the conflict in the Sixth Circuit caused by this case, but also because this fundamental issue can best be examined along with the issue of the validity of cards so that these two major problem areas created by the Section 8(a)(5) bargaining order can be resolved.

CONCLUSION.

For the reasons stated above, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[22] Accord: *NLRB v. Sehon Stevenson Co.*, 386 F. 2d 551, 553 (4th Cir. 1967); *Benson Veneer Co., v. NLRB, supra,* at 68 LRRM, at p. 2695. The Sixth Circuit has registered its disapproval of *NLRB v. Logan Packing, supra,* on the issue of the impact of the 1947 amendments to Section 9(c) of the Act prescribing a bargaining order in those situations where a question of representation exists. *NLRB v. Atco Surgical Supports, Inc.*, ____ F. 2d ____, CCH LC ¶ 12,677 (6th Cir. 1968). The Fifth Circuit has recently registered its approval of *Logan Packing,* but has refused to go so far on the issue of good faith. *NLRB v. Southland Paint Co., supra,* 68 LRRM, at p. 2177.

APPENDIX

APPENDIX A.

DECISION OF U. S. COURT OF APPEALS FOR SIXTH CIRCUIT ENTERED JUNE 28, 1968.

Before: PHILLIPS, McCREE and COMBS, Circuit Judges.

PHILLIPS, Circuit Judge. The decision and order of the Board, reported at 163 N.L.R.B. No. 61, required the employer to bargain with the Union upon the ground that the Union had a majority of valid authorization cards on the day that it demanded recognition as bargaining agent. The Union later lost a Board supervised election by a vote of 81 to 67.

The employer has filed a petition for review to set aside the Board's order. The Board has filed a cross-petition for enforcement.

The Board held that the employer was guilty of various unfair labor practices in violation of § 8(a)(1) of the Act, which dissipated the Union's majority between the time of its demand for recognition and the day of the election. It further held that the employer violated § 8(a)(5) of the Act by refusing to bargain with the Union after a majority of the employees had designated the Union as their bargaining representative.

The authorization cards are unambiguous.[1] No refer-

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[1] The cards used by the Union contained the following language:

"TEAMSTERS LOCAL 20 ORGANIZING COMMITTEE
Affiliated with the I. B. of T., C., W. & H. of Am.

"I HEREBY ACCEPT MEMBERSHIP IN TEAMSTERS LOCAL NO. 20, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and of my own free will hereby authorize the above Union to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment."

(Continued on following page)

ence to an election appears at any place on the face of the cards.

During the organizational campaign the Company's personnel director spoke to both shifts of employees, warning that the cards being circulated by the Union were membership cards, not election authorization cards. He stated: "Membership cards mean just that—membership." He asserted that the Union may be trying to obtain recognition without an election, saying: "They have not told you the kind of card which you are signing. The card which they are asking you to sign is a bona fide acceptance of membership in Teamsters Local Number 20."

At two mass meetings of employees the Union's business agent explained three alternative methods by which the Union might secure recognition if sufficient authorization cards were signed: (1) by an impartial third-party check of the cards; (2) by a private election under the auspices of local citizens; or (3) by a Board representation election. The Union later sought recognition through the first and third alternatives.

In demanding recognition both orally and in writing, the Union claimed that it possessed authorization cards signed by a majority of employees in the unit. In responding to the Union's demand, the company expressed no doubts as to the Union's majority status. The record establishes that the Union held a majority of signed authorization cards on the day it demanded recognition.

The Board made a finding of fact to the effect that the Company's rejection of the Union's demand was not the

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The card then provided spaces for the employee to both print and sign his name, and for date, address, telephone number, name of employer, social security number, class of work, and hourly rate. At the bottom appeared the legend: THINK UNION — TALK UNION — BE UNION.

product of a good faith doubt, but was motivated by a desire to gain time "to stifle the union"; that the Company immediately set in motion a systematic campaign to prevent collective bargaining and to insure continuation of the non-union status it had enjoyed for twenty years; and that the dissipation of the Union's majority was accomplished by numerous unfair labor practices outlined in detail in the Board's reported decision.

We find that the decision and order of the Board are supported by substantial evidence on the record as a whole and that enforcement should be granted. *N.L.R.B. v. Swan Super Cleaners, Inc.*, 384 F. 2d 609 (6th Cir.); *Dayco Corp. v. N.L.R.B.*, 382 F. 2d 577 (6th Cir.); *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F. 2d 917 (6th Cir), *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 341 F. 2d 750, cert. denied, 382 U. S. 830.

The company's petition to review and set aside the order of the Board is denied. Enforcement is granted.

APPENDIX B.

ORDER OF U. S. COURT OF APPEALS FOR SIXTH CIRCUIT DENYING PETITION FOR REHEARING ENTERED AUGUST 13, 1968.

Upon consideration, it is ORDERED that the petition for rehearing and the suggestion for rehearing in banc be and the same hereby are denied.

Entered by order of the Court.

s/ CARL W. REUSS,
Clerk.

APPENDIX C.

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD.

(163 NLRB No. 61.)

On September 14, 1966, Trial Examiner Ivar H. Peterson issued his Decision in the above-entitled case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Atlas Engine Works, Inc., Gibsonburg, Ohio, its officers,

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[1] Even if, *arguendo*, Richard H. Hughes were excluded from the unit as a temporary employee, the Union would still represent a majority of the employees in the appropriate unit.

agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

IT IS FURTHER ORDERED that the petitions for certification of representatives, filed in Cases Nos. 8-RC-6028 and 8-RM-428 be, and they hereby are, dismissed, and that all proceedings held thereunder be, and they hereby are, vacated.

Dated, Washington, D. C., Mar. 20, 1967.

JOHN H. FANNING, *Member,*
HOWARD JENKINS, JR., *Member,*
SAM ZAGORIA, *Member,*
National Labor Relations Board.

(Seal)

APPENDIX D.

DECISION OF TRIAL EXAMINER OF NATIONAL LABOR RELATIONS BOARD.

STATEMENT OF THE CASE.

Upon charges duly filed on August 23, 1965, by Teamsters, Chauffeurs, Warehousemen and Helpers Local #20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, against Atlas Engine Works, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for the Eighth Region, on November 4, 1965,[1] issued a complaint alleging that the Respondent had engaged in certain unfair labor practices violative of Section 8(a)(1)

[1] All dates refer to the year 1965 unless otherwise indicated.

of the National Labor Relations Act. Thereafter, on November 16, an amended complaint was issued, adding allegations that the Respondent had unlawfully refused to bargain with the Union on and after July 15, thereby violating Section 8(a)(5) of the Act. By order simultaneously issued the unfair labor practice case was consolidated "for the purposes of hearing, ruling and decision by a Trial Examiner" with Cases Nos. 8-RC-6028 and 8-RM-428, in which the Board, by order dated November 3, had directed that a hearing be held on certain objections filed by the Union arising out of an election held on August 6 pursuant to a stipulation for certification upon consent election.[2] In its duly filed answer the Respondent admitted certain allegations of the complaint but denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me, Ivar H. Peterson, as duly designated Trial Examiner, at Fremont, Ohio, on various dates commencing January 19 and ending February 9, 1966. All parties were represented and participated in the hearing. Briefs filed by the General Counsel and the Respondent have been fully considered.

Upon the entire record in this consolidated proceeding, and my observation of the witnesses and their demeanor, I make the following:

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[2] The stipulation was executed on July 27 and approved by the Regional Director on July 28. The election was held on August 6, and resulted in the Union being defeated by a vote of 81 to 67. Thereafter, the Union filed timely objections to the conduct of the election and to the conduct affecting the results of the election. On September 30 the Regional Director issued his report on objections (amended October 1), in which he concluded that certain objections were without merit and should be overruled and that certain other objections raised issues warranting a hearing. On October 12 the Respondent filed exceptions to such of the Regional Director's findings, conclusions and recommendations as supported the Union's objections. The Board's order of November 3 adopted the Regional Director's recommendation that a hearing be held on certain objections.

FINDINGS OF FACT.

I. The Business of the Respondent.

The Respondent, an Ohio corporation with its principal office at Woodville, Ohio, maintains a plant at Gibsonburg, Ohio, with which this proceeding is concerned, where it is engaged in the manufacture of crankshafts and other machine work. From the Gibsonburg plant the Respondent annually ships products valued at in excess of $50,000 directly to points outside the State of Ohio. The Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices.

A. Interference, restraint and coercion.

1. Sequence of events; the Respondent's campaign to defeat the Union.

The Union began organizational efforts among the approximately 160 employees at the Respondent's Gibsonburg plant on June 9.[3] After a number of small group meetings and the solicitation of signatures to authorization cards, the first open meeting attended by some 40 or 45 employees was held on July 7. On this occasion Eugene

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[3] Earlier unsuccessful attempts had been made by two other labor organizations, the Mechanics Educational Society of America in 1963 and the United Steelworkers of America in 1964. In a prior proceeding, *Atlas Engine Works, Inc.*, 129 NLRB 101, the Board found that the Respondent, in connection with organizational efforts of the United Automobile Workers in the fall of 1959, had discriminatorily discharged four employees and had engaged in other coercive conduct violative of its employees' self-organizational rights.

Shumaker, business agent of the Union, explained three methods for obtaining recognition as collective bargaining representative if sufficient authorization cards were signed: first by means of a card check by some impartial third person, second he mentioned the possibility of a private election under the auspices of a labor-management-citizens committee, and finally a Board-conducted representation election. Shumaker made a similar explanation at the next mass meeting, on Sunday, July 11, which was attended by some 60 employees.

At about 2 p.m. on July 15, following another mass meeting on July 14 and the distribution of handbills at the plant gate on July 8 and 13, Donald Sarver, a business representative of the Union, telephoned Harold C. Warner, the Respondent's personnel director, claimed that the Union represented a majority of the Respondent's employees and requested a meeting for collective bargaining. Warner, the only participant in this conversation to appear as a witness, credibly testified that he in substance declined to grant recognition and told Sarver that the Union could petition the Board for an election. On the same day Sarver sent the Respondent a letter, received on July 16, claiming that the Union had been authorized as collective-bargaining representative by a majority in a defined unit, offering "to submit the authorization cards signed by your employees to an impartial person for examination and count," and requesting recognition as exclusive representative and the commencement of negotiations for a bargaining agreement at the earliest possible date. Warner wrote to Sarver on behalf of the Respondent on July 19, acknowledging the Union's claim of majority representation and desire to meet with representatives of the Respondent. Warner's letter continued:

> We have consistently recognized the right of our employees to join or refrain from joining unions.

There is however, a procedure established by law wherein our employees can exercise this right.

We are fully prepared to co-operate with the National Labor Relations Board through their due process of investigation in determining the validity of your allegation by having that agency conduct a secret ballot representation election.

On July 10, shortly after the Union's first general meeting on July 7, the Respondent's president, T. W. Clark, gave short speeches, using the same prepared text, to employees on the first and the second shifts. Clark stated that the employees had been called together "because of the union activity in the plant which has caused much concern amongst you," and that employees "have come to us wanting to know what to do." Referring to the solicitation of authorization cards, Clark said that because "there has been some pressure put on you to sign cards, we want to tell you that this is not compulsory." He asked that employees inform management "if anyone puts the pressure on you to sign with a threat, coercion or fears." Clark then proceeded to detail "a few facts," for the reason the Company had "hired many new people who are inexperienced, not only in machine shop operations, but in tactics such as a union campaign can involve." He then stated that "what the union is after" was dues, "and that is all they are after," and enumerated certain benefits enjoyed by employees which he said were attributable to the efforts of the Respondent and not those of any labor organization. He concluded as follows:

We have made great progress all along with the greatest in the last three years without a third party dictating.

We are adding on a Chrome Plating Department and a Heat Treat Department to further strengthen your company in a competitive field thus making your job stronger and more secure.

We hope nothing will happen to impede this progress. You do not have to sign these cards. We do not need a third party. We hope this has answered some of your questions.

Personnel Director Warner spoke to both shifts of employees on July 14, stating that the Union was not "being entirely honest" with the employees in its organizational efforts. Warner's prepared text reads in part as follows:

> During the past few days it has been reported that several people are being continually badgered and are being coerced into signing membership cards, and I repeat, membership cards and not authorization cards. Membership cards mean just that—membership. Authorization cards mean that if sufficient cards are signed, or 30%, that you can expect to have an election.
>
> Let me clarify this. We do not believe that the Teamsters are being entirely honest with you particularly at the beginning of their campaign to attempt to organize you people. They have not told you the kind of card which you are signing. The card which they are asking you to sign is a bona-fide acceptance of membership in Teamsters Local Number 20. . . .
>
> It appears that the Teamsters may be trying to avoid an election by imposing a union on you without having an election. This is contrary to the democratic principles which our country is based on. This is the type of union which is attempting to represent you. If they are starting out this way, what can you expect in the future?
>
> I can assure you that we are not in accord with the union's interpretation of democratic process. I am sure you desire an opportunity to think about the seriousness of union organization, and then, have an opportunity to cast your vote in the sanctity of a voting booth wherein no one but you will know how you vote.

During the afternoon of July 16, after the Respondent had received the Union's letter claiming a majority and requesting recognition, President Clark addressed the assembled employees. According to the text of his remarks, he stated:

> We have brought you together again this afternoon to bring you up to date on the union activity in your plant.
>
> Yesterday afternoon at 2 o'clock Mr. Don Sarver of Teamsters Local 20 called Mr. Warner asking us to meet with him to negotiate. We told him where to go (to the NLRB in Cleveland).
>
> You see, he wants to avoid the democratic process of each and every person having a vote in whether or not they want this union to represent them.
>
> These cards which some of you have signed are not an authorization for an election, but membership cards. It is the opinion of many who have signed cards that you were signing *for* a democratic election in the future. However, you were misled into signing membership cards and those who have signed are now full-fledged members of Teamsters Local 20.
>
> This afternoon we received a certified letter from Mr. Don Sarver . . . which confirms yesterday's telephone conversation.
>
> Many of you people have come to us for advice and it has been reported that statements have been made by some employees here attempting to organize you people that if you do not join the union you will be fired and if you have not been here six months the union doesn't want you and you will be separated. These are outright threats and should be brought to the attention of the company for your protection.
>
> You do not have to sign the cards and you do not have to join the union to keep your job. If the union has this power to fire employees, then what protection does anyone have? We certainly will not let anything like this happen to our employees. Manage-

ment, under all circumstances, is the only body having any authority to separate or discharge any employees.

In looking back three years ago when we had a union election in this plant, which the union lost, our production dropped about 60 per cent, and we lost three good customers. We were able to regain two of them, and Kalvinator is completely lost. So that they are not a customer today. This caused some layoffs . . . which we could not have.

We do not want this to happen this time. Please keep your production up, meet your quotas, and turn out good quality.

If anything happens to your production and quality, we will not have any customers, whether a union organization comes into the plant or not.

Also during the afternoon of July 16 Clark and Warner met to consider what steps would be taken by the Respondent to counter the Union's organization efforts. As Warner testified, they "decided on an active campaign of education, information and persuasion" among the employees in order to persuade them "to vote no Union." [4] That evening Clark and Warner met with about seven of Respondent's supervisory personnel and apprized them of the plans Clark and Warner had earlier discussed for launching a campaign to defeat the Union. Clark read the Union's letter requesting recognition; Clark testified that he "made the remark that we had had previous campaigns and previous experiences with unions trying to come into the plant and that we were not going to

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[4] Warner had telephoned the Cleveland Regional Office of the Board on July 16, after receiving Sarver's letter, and asked for representation petition forms, stating that he "was hopeful that the Union would file a petition for a representation election," but that if it did not do so the Respondent would. Petition forms were mailed to the Respondent on July 16, received by it on Monday, July 19.

negotiate with just a letter or a phone call." [5] In order to obtain an assessment of the extent of the Union's support among the employees, Clark read off the payroll list and asked the supervisors to respond whether the particular employee was for the Company, the Union, or undecided. According to Warner, the results indicated that there were "63 pro Company, 61 pro Union and about 45 questionable." Govino (Al) Rojas, a foreman present at this and subsequent meetings concerned with the Respondent's antiunion campaign, credibly testified that after this initial canvass of employee sentiment President Clark "said it didn't look so good because of the question marks," that "he wasn't about to deal with" the Union and added "to hell with them," and stated that "the reason he would ask for an election is he thought he would win if he talked to people and found out what the people's feelings were; and he thought they were misled, and thought it would be better if we went through a democratic election." Warner advised the supervisors, as he testified, that "the campaign was on," "mentioned to them their behavior patterns as to what they can do, what they couldn't do," and told them that further meetings would be held and that literature would be made available "to remind them again of their behavior in the conducting of the campaign . . ."

Following the July 16 meeting with supervisors, the Respondent held two additional evening meetings, preceded by dinner, of all supervisors and certain selected nonsupervisory employees, at the Crystal Inn, a motel-restaurant on the Detroit-Toledo expressway, on July 21 and 28. At the July 21 meeting Warner and Clark again went through the payroll list, checking off the names of

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[5] There was no discussion, according to Clark, of the Union's offer to submit the authorization cards for examination and count by some impartial person.

employees as for the Company, the Union or questionable on the basis of the information supplied by the supervisors and at least some of the nonsupervisors present. The results of this survey, according to Warner, showed "a slight percentage edge of those favoring the Company over those favoring the Union, and the question marks were reducing themselves." Warner testified that in view of the results he decided "not to intensify our campaign any more than we had visualized" and so informed those present.

During this meeting those in attendance were briefed by Warner on what they could and could not do in encouraging and persuading employees to reject the Union and in ascertaining the union attitudes and leanings of employees. They were instructed, as Warner testified, to "concentrate on this newer group" that had been hired in recent months, and in particular upon "those people that we knew little or nothing about or the question marks." The supervisors and nonsupervisors at the July 21 meeting were each given for their guidance in the campaign a detailed brochure which Warner described in the covering instruction sheet as intended to help them "answer any questions that may arise" during the Union's organizational efforts and to guide them "concerning your conduct and behavior in speaking with employees." The instructions further stated:

> Action, from here on out, is the keynote. When you receive any comments, good or bad, or rumors, be sure to report these facts, or make note of them and immediately advise the plant manager or H. C. Warner. Do it *now! Don't* wait until tomorrow, as the next day may be too late to act.
>
> I am confident that if each and every one of us does his job conscientiously, carefully studies the enclosed material and disseminates it at every opportunity, that we will have a majority *No Union* vote

when the election results are finally posted. Not until then will we be able to get down to the serious business of running our organization without the interference of a third party or stranger.

One final and very important note on what some of the things are that will help us to keep our employees satisfied on their jobs. Many people feel that it is the economic things, such as wages, benefits, facilities, equipment, etc. that are most important. Actually these are only a part of the story. The *most important factor* is our good relationships with our people. This means *taking time out* to talk to the people, recognizing the need for dignity and self-respect of each individual—treating people as the individuals they are—*taking into consideration the personal feelings of each one,* and *being fair, just and consistent.* This relationship with people is *your* responsibility—one that none of us can shift to someone else. You are an individual person—how do *you* like to be treated? The answer is quite obvious, I am sure.

Let us keep the above and following points well in mind and see how good a personnel and communication job we can do with our employees.

H. C. Warner
Personnel Director

The first section of the brochure gave these illustrations of what supervisors were and were not permitted to do: They could "Talk with employees at any time, in any public place or *open working area,*" but not in managerial offices, at the foreman's desk, or in employees' homes; supervisors could state what they thought about unions and union policies, but they should not "say anything as foolish" as that the plant would close if a union were voted in or that the Company would not negotiate with a union; they were permitted "to talk generally about what unions

have done in the nation and in specific plants, such as strikes, picket lines, violence"; they could "state what you believe to be the answer to any union agreement or claim, whether you think a union demand is fair"; they could express an opinion "as to how employees will be affected by what union representatives are doing"; and they could state their belief that employees should vote "No" in the election. The instructions stated that supervisors could not "ask employees what they think of unions generally or of any particular union"; "ask if an employee belongs to a union or whether he knows if other employees belong"; "ask how an employee has voted or will vote in a union election"; inquire whether "an employee attended any union meeting, who was there, who signed up, who hasn't etc."; and, finally, they were cautioned that "you cannot *promise any benefits, bribe, threaten, coerce* or *discipline* to influence an employee in his right to belong, or refrain from belonging to a union."

In addition to suggestions on how to approach employees to encourage them to "open up and tell . . . what he knows is going on," the brochure listed several pages of questions "commonly asked by employees before an election," with suggested answers. The tenor of the questions and the answers emphasized the costs, risks and possible disadvantages of union representation.

At the July 28 meeting Clark and Warner again canvassed employee sentiment by going through the payroll list and receiving reports from the supervisors and nonsupervisors present regarding the union leanings of particular employees. Some time was spent in reviewing the benefits and privileges then enjoyed by employees and a tentative list of these was considerably augmented. As thus developed, the list was reproduced the following day and made available to the supervisors and the nonsuper-

visory employees participating in these meetings for use in discussions with employees. The introductory paragraph of the document containing the "fringe benefits and other considerations which all employees currently enjoy" read in part as follows:

> Let us emphasize that these benefits and other factors have been improving and increasing steadily *without* any pressures, coercions, or threats from any union and that if a third party or stranger is voted in, all of these benefits and considerations *are subject to negotiation.* The Union may try to convince the employees that "they can't lose anything, that they can only gain." This is not a true statement, and it is important to emphasize the following: . . . All present benefits, listed below, are as much a subject of negotiation as are demands for additional benefits . . . .

The nonsupervisory employees who attended one or both of the meetings on July 21 and 28 were Salvator (Sam) DiMasso, Ralph Cogar, George Busch, Clarence Haubert and Louis Beruscha. DiMasso, the stockroom attendant, had signed a union card on July 11 but subsequently actively opposed the Union after having had a disagreement with several of the employee adherents of the Union. Warner's explanation for having DiMasso attend the meetings was to have DiMasso make a presentation to the supervisors of the complaints "that he had overheard at his place of business across the stockroom window concerning actions of supervisors . . . ." President Clark added that DiMasso "meets everybody" because of his work location and thus was in a position, because employees "probably confide in him a little bit more," to identify the reasons for "unsettledness in our plant" and be of help in solving the problems "so there is no Union necessary." DiMasso, as he testified, attended both meet-

ings, gave his views as to the union leanings of employees as the payroll list was checked, and engaged in discussions with employees in the plant about company benefits and advanced arguments why they should vote against the Union. Cogar's job during the organizational period was that of inspector, which required that he check machine operations on the several lines, thus bringing him into contact with employees generally during the course of his duties. Also, Cogar had been a supervisor previously, and Warner testified that he included Cogar in the group for this reason and "because of his experience in former campaigns and his knowledge of some people" Cogar could "lend something to the group discussion." Busch, the former manager of the Dunkirk, Ohio, plant of Atlas Industries, a related concern under the same ownership and management as the Respondent, had been working as a toolmaker at the Gibsonburg plant since February 1965. Haubert attended only the July 21 meeting, in the place of Russell Hoffman, the master mechanic, who was then on vacation. Beruscha, a former supervisor, attended only the July 28 meeting, being invited by Warner for the same reasons as Warner testified prompted him to include Cogar in the group.

The record fairly reflects, in my opinion, that during the meetings of July 21 and 28 it was made clear to the nonsupervisory persons present that the instructions contained in the brochures distributed to them, insofar as these instructions prohibited supervisors from making direct inquiry of employees regarding their union sympathies, were not applicable to the nonsupervisors such as DiMasso, Cogar and Busch. Thus DiMasso, a witness for the Respondent, testified that Warner agreed with DiMasso's statement that the written instructions to supervisors did not apply to him, and that this exchange occurred

when the instruction brochure was being distributed and in the presence of the other nonsupervisory employees in the meeting. Foreman Rojas, a witness for the General Counsel, credibly testified that Personnel Director Warner, either at the July 21 or 28 meeting, stated that supervisors could not ask direct questions of the employees but that persons such as Cogar, Busch and DiMasso, who did not "belong to the supervisory level," could do so.

During the week preceding the election a final meeting of the supervisory group was held in the main office at the plant. Again the payroll list was canvassed, as at the earlier meetings. The results, according to the credited testimony of Foreman Rojas, were that "the list was pretty well on the Company's side."

2. Conclusions as to the Respondent's campaign.

Paragraph 10 of the complaint alleges that at the supervisory meetings referred to in the preceding section the Respondent "instructed its supervisors and certain designated employees to campaign actively on behalf of the Respondent; to invite conversations with the other employees; to seek out through indirection during the course of these conversations the union leanings and/or sympathies of the other employees; and then to report the union leanings or inclinations of its employees to officials of the Respondent." Paragraph 11 alleges that at these meetings the supervisors and designated employees were interrogated "with respect to the Union affiliation, membership and/or sympathy of all of its employees" and, in response to such interrogation and pursuant to the instructions given, the supervisors and designated employees reported "the union leanings and/or inclinations of its employees." In its answer, the Respondent alleged that the meetings were held in order to permit Respondent "to

combat the repeated misrepresentations made by and on behalf of" the Union and "to actively acquaint, inform and persuade its employees with respect to its reasons for opposing" the Union's efforts to become the representative of the employees. The answer further alleged that "said meetings had for their purpose continued efforts to dissipate and seek to nullify" misrepresentations by the Union; "the reviewing of the progress of" the Respondent and the Union, respectively, "in their solicitation of the support of the employees"; and "especially the assuring of an understanding of benefits already enjoyed by employees of short service, and such employees as were deemed to be undecided with respect to their position on the representation issue."

As the findings in the preceding section of this Decision establish, the Respondent embarked upon a systematic campaign to dissuade its employees from selecting the Union as their collective-bargaining representative. In addition to the antiunion speeches of President Clark and Personnel Director Warner, which are not claimed to have unlawfully impinged upon the employees' self-organizational rights, an integral part of the Respondent's campaign was to identify those of its employees who were sympathetic with the Company, those whose sympathies or leanings were toward the Union, and those who were undecided or whose attitudes were not known. In order to make this assessment of employee sentiment, supervisors and the key bargaining unit employees attending the July 21 and 28 management meetings were asked to classify employees, as the payroll list was read, as pro-Company, pro-Union, or questionable. Moreover, they were instructed to find out, by engaging employees in conversations and questioning them, where employees—particularly those in the unknown or undecided category—stood;

the supervisors were told to do this by indirection, but the key nonsupervisory employees were told that they could ask direct questions. The supervisors and key employees, I find, did ascertain and report on the union leanings and sentiments of employees. I further find that by including DiMasso, Cogar and Busch in the management meetings and assigning them to find out and report on the union attitude and sympathies of their fellow employees, the Respondent made them its agents, as alleged in the complaint.[6]

I find that the Respondent interfered with the Section 7 rights of the key nonsupervisory employees (DiMasso, Cogar, Busch, Haubert and Beruscha) by interrogating them concerning the union sympathies of fellow employees. I further find that by asking the supervisors and the key employees to classify employees with respect to their union sentiment, instructing them to engage employees in conversations in order to ascertain their views, and soliciting reports on employee views thus obtained and rating employees on the basis of such reports as for or against the Union, or questionable, the Respondent engaged in conduct that interfered with the self-organizational rights of its employees generally, in violation of Section 8(a)(1) of the Act.[7]

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[6] On the evidence, the same finding could be made as to Haubert and Beruscha. However, the complaint did not allege that they were agents and I make no such finding.

[7] See *Cannon Electric Co.*, 151 NLRB 1465, 1469, where the Board held that "the instructions to supervisors to report the names of union adherents and compliance with such instructions interfered with employee rights under Section 7 and thereby violated Section 8(a)(1) of the Act." See also *Sunbeam Plastics Corp.*, 144 NLRB 1010. As the Board observed in the *Cannon* case, the "frequency of a pattern of employer conduct associating discrimination against union adherents with employer's efforts to learn the names of union activists supports the con-

(Continued on following page)

3. The no-solicitation and no-distribution rule.

Paragraph 7 of the complaint alleges that at all times material the Respondent "has maintained in effect and enforced a no-solicitation rule which prohibits the distribution of written or printed matter of any description on company premises unless approved by Respondent." The Respondent's answer "admits the allegations of Paragraph 7 . . . to the extent that a rule exists requiring prior approval for the distributing of written or printed matter on Company premises," but "specifically denies that such rule . . . was . . . discriminatorily applied." Paragraph 8 of the complaint alleges that on or about July 22 the Respondent "modified its no-solicitation rule . . . by posting a notice to all employees" in the following language:

NOTICE TO ALL EMPLOYEES

SUBJECT: CONDUCTING OF UNION BUSINESS ON COMPANY TIME.

FROM: HAROLD C. WARNER, PERSONNEL DIRECTOR

YOU ARE CAUTIONED THAT WE WILL NOT CONDONE ANY SOLICITATION OF UNION MEMBERSHIP OR THE DISTRIBUTION OF ANY UNION MATERIAL BY ANY EMPLOYEES DURING NORMAL WORKING HOURS.

ANY VIOLATION OF THE ABOVE WILL SUBJECT THAT INDIVIDUAL TO DISCIPLINARY ACTION.

Paragraph 9 of the complaint alleges that, since July 21, the rules described in Paragraphs 7 and 8 were discriminatorily enforced in that employees were prohibited "from engaging in prounion solicitation and campaigning during working hours" whereas Respondent permitted and encouraged "certain of its employees and supervisors to engage in antiunion solicitation and campaigning during

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clusion that there is a 'danger inherent' in such conduct: a tendency toward interference with the exercise by employees of their organizational rights." And where, as in *Cannon* and in my opinion here, such tendency is not balanced by "legitimate employer interests," the conduct may be outlawed.

working hours." Respondent, in its answer, admitted the allegations of Paragraph 8 of the complaint but denied "that the notice posted by Respondent and set forth in Paragraph 8 . . . constituted a modification of its rule and practice thereunder referred to in Paragraph 7" of the complaint. The Respondent denied the allegations of discriminatory enforcement contained in Paragraph 9 of the complaint.

As I read these pleadings, the following facts are admitted: (1) the Respondent, at all material times, maintained and enforced a rule prohibiting distribution of any written or printed material on company premises without prior approval of the Respondent. (2) The notice of July 22 banned both solicitation of *union* membership and the distribution of *union* material by any employees during "normal working hours." On its face, the July 22 notice does not prohibit union solicitation outside "normal working hours," which I interpret to mean during employees' nonworking time. So interpreted the rule is a presumptively valid no-solicitation rule. However, with respect to distribution of union material, the notice of July 22, as I interpret it, did not relax the preexisting requirement of prior company approval for the distribution of written or printed material on company premises—without distinction as to working or nonworking areas.[8]

Insofar as the rule banned the distribution of union material in nonworking areas of the plant during nonworking time, without prior approval of the Respondent, I find that the rule was invalid and violative of Section

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[8] While the notice did not in terms prohibit distribution in nonworking areas during nonworking time, I construe the Respondent's admission that "a rule exists requiring prior approval" to mean that such a requirement not only existed prior to July 22 but remained in existence after the posting of the July 22 notice.

8(a)(1) of the Act. See *Walton Manufacturing Company*, 126 NLRB 697, enfd. 289 F. 2d 177 (C.A. 5); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615.[9] Moreover, I find that the July 22 notice was promulgated by the Respondent as a part of its campaign to defeat the Union. In view of the open and encouraged antiunion solicitation engaged in by supervisors and key nonsupervisory employees (Busch, Cogar, and DiMasso) during working time, from the time the rule was posted until the August 6 election, I find that the rule was adopted for the discriminatory purpose of curbing employee activity in behalf of the Union. Under these circumstances, the rule was an unjustified restriction of the employees' right of self-organization and violative of Section 8(a)(1) of the Act.[10]

4. Alleged interrogation, threats and promises.

The complaint alleges that a number of named representatives of management engaged in conduct independently violative of Section 8(a)(1) of the Act. These separate incidents, generally involving alleged statements made to specific employees, will next be considered.

a. President Clark.

It is alleged that President Clark, on about July 10, threatened employees with discharge and other economic reprisals if the Union were successful in its organizational efforts and also promised promotions and other economic

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[9] There is no evidence that the rule was necessary by reason of production or efficiency considerations or that a litter problem would exist in absence of the rule.

[10] See *Wm. H. Block Company*, 150 NLRB 341; *Ward Manufacturing, Inc.*, 152 NLRB 1270.

benefits if employees refrained from becoming or remaining members of the Union; it is further alleged that on about August 2 Clark coercively interrogated employees.

As found above, Clark spoke to both shifts of employees on July 10, during which he referred to "some pressure" being put on employees to sign union cards, asked employees to inform management of any coercive tactics in this regard, and referred to benefits then enjoyed by employees. Frank Ruiz, an employee active in promoting the Union and obtaining authorization cards, interrupted Clark, identified himself as a card solicitor, and stated that as far as he knew no threats had been made. During the course of the discussion period following Clark's talk Ruiz had an exchange with John Shumaker, production control manager, about the Respondent's vacation plan and with Donald Halstead, time study supervisor, about whether or not production quotas were too high. After the meeting, Clark and Ruiz had a further conversation in the office of Plant Manager James Sutton, which is adjacent to the lunchroom area where the meeting addressed by Clark had been held. According to Ruiz, Clark asked him what he hoped to gain through the Union, to which Ruiz replied, better job security and higher pay. Clark, so Ruiz testified, stated that job security "was pretty good," but that if the Union came in it "would probably want" a 40- or 50-cent raise, which the Respondent could not afford, with the result that the plant might have to close. Clark also referred to the excess amount of scrap and said that a particular production line might have to close if the Union came in because the concern for which the crankshafts on that line were being produced could make them more advantageously. Ruiz also testified that Clark stated, with reference to Venancio Reyes, an employee Production

Manager Shumaker had wanted to let go because of inability to make the quota, that Reyes was retained for the reason he had worked there a long time, but that if the Union came in and Reyes failed to make the quota the Respondent, because matters "would be more impersonal," "might have to let him go."

It is Ruiz' testimony that Clark asked, during this conversation in Sutton's office, "How do you think you would do as a foreman?" Ruiz testified he replied that the job involved too much responsibility, and that Clark "told me the man with the right incentive could probably make a good foreman," that the Respondent might promote Foreman Rojas to assistant engineer thus creating a vacancy, which management might then select Ruiz to fill.

According to Clark, he and Ruiz continued talking about quotas in Sutton's office, immediately after the exchange between Ruiz and Halstead on this subject, with Ruiz stating that he could not meet some of the quotas. The following then occurred, so Clark testified:

> I said, "Mr. Halstead takes 80 per cent off of those quotas. He tries to make them as fair as possible for the average person to produce. We base our figures and we base our prices on these quotas. We have to do this, because we are competitive, so quotas have importance."
>
> He said, "Well, the unions get the quotas down." I said "This is right, but the unions are fair and if we would bring in a union time study man he will set that quota and possibly, Frank, you can't hit it. They will be fair." . . . He said, "Well, if we get the Union in we will have higher wages and we will have lower quotas."
>
> I said, "This is possible. I don't know. It would affect our cost. I know it would affect our cost."

At this point, Clark picked up a crankshaft being produced for a customer, and stated:

> Frank, here is a shaft . . . that we are going to lose. I am having trouble with cost on it. Now, this affects our quotas. . . . Copeland, who is our Customer, is going to make this shaft. In fact, they have got the equipment in on it. I can't compete with their price. They are going to make this shaft and they may make the shaft on line 6. These are just basic sound facts. . . . I am not worried about losing it. We will have plenty of work . . . but we are going to lose this shaft because we can't compete. . . . Frank, this is the reason we have to hit these quotas, because our prices are based on these quotas.

Clark gave the following testimony on the question of Ruiz becoming a foreman:

> Q. There was no discussion of Mr. Ruiz being made a foreman or anything of that nature?
>
> A. No, there wasn't. I don't know where that stemmed from. Theoretically he was concerned. Here was a statement that was made I think before we got pushed into the office.
>
> He said, "Ted, maybe you don't know it, but I am a Union pusher."
>
> I said, "You are? . . . I didn't know it. . . . That is up to you, Frank, if you feel that way. I didn't know that you were pushing for the Union. I know it now. You are telling me. That is your privilege. You . . . were here in past campaigns, and I think your tendencies were in that direction also."
>
> He was concerned about his job.
>
> I said, "Frank, you do not have to worry about your job. You have been here through these campaigns before and you still have your job. You are a good worker, you are a good employee, your quality is good." I tried to settle him down and have him feel comforted.

He said, "I'll probably lose my job." I said, "You will not lose your job. You do not have to worry about that." He said, "Well, I am not getting ahead. I am not making enough."

I said, "This could be possible. . . . We . . . try to pick the best employees on the line to come up and be assistant line foremen and foremen. That is where we have to draw them from. You have not shown an interest in that direction. That is the way you advance."

I said, ". . . When we want to advance somebody we look down the lines and we pick these different people that have the most ability and we move them up. Why you have not been recommended I don't know . . . . This is something that I cannot answer."

I did not promise him a foreman's job. It was theoretically spoken of there.

Clark was not questioned about the statement Ruiz attributed to him to the effect that the plant might have to close if the Union succeeded in getting a 40- or 50-cent raise, nor did he deny that he told Ruiz that with a union in the plant relations between management and employees would be more impersonal and an employee such as Reyes who failed to make the quota might be let go. Ruiz impressed me favorably as a witness and I credit his account of the discussion he had with President Clark. The latter's version corroborates that of Ruiz in substantial part and, in the respects noted, Clark did not deny or contradict the statements attributed to him. I find that Clark's references to the possible closing of the plant or a production line in the event the Union came in were more in the nature of predictions of what might happen if union demands, either in terms of wages or production quotas, caused the Respondent to be unable to compete, rather than express or implied threats of economic reprisal. I

do not find these statements violative of Section 8(a)(1). However, Clark did state that the advent of the Union would lead to more impersonal and strict application of production quotas, with the result that an employee such as Reyes, who had been retained because of his long period of employment despite failure to make the quotas, might be let go. I find this was an express threat of economic reprisal and violative of the Act.

With respect to the reference to a foreman's job for Ruiz, Clark, I find, introduced the subject, by asking how Ruiz thought he would do in that job, in the context of a discussion of Ruiz' personal job security and possibilities of advancement. Clark, as he testified, praised Ruiz' job performance but stated he had "not shown an interest" in moving up to assistant foreman or foreman. From Clark's testimony, quoted above, in which he referred to Ruiz' union "tendencies" in prior as well as the present campaign, and Ruiz' credited testimony that Clark said "the man with the right incentive could probably make a good foreman," I infer that Clark clearly implied that for Ruiz to receive favorable consideration for a foreman's position, for which Clark indicated Ruiz was probably qualified, depended upon Ruiz abandoning the Union. By in effect conditioning the possibility of job advancement for Ruiz upon abandonment or renunciation of union activity, the Respondent violated Section 8(a)(1) of the Act, and I so find.[11]

Raymond Sleek, night watchman at the plant, testified that "a week or two before the election," as he was opening the plant gate for Clark one night, Clark asked

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[11] Since this incident was fully litigated, I conclude that the above finding is warranted even though the allegation in the complaint is that Clark promised Ruiz promotion if he refrained from becoming or remaining a member of the Union.

if Sleek had attended any of the plant meetings held by Respondent. At the time Sleek was wearing a Teamster badge. When Sleek replied that he had not attended company meetings, Clark "asked if I was to the Teamster's meetings," to which Sleek replied in the affirmative and asked Clark "if there was anything wrong" in doing so. Sleek testified Clark said there was nothing wrong in going to union meetings, that Sleek "had a perfect right to go." The foregoing testimony of Sleek is undenied, and I credit it. Clark recalled the incident, testifying that he noticed Sleek was wearing a union badge and that "I made a kidding remark" to Sleek, the nature of which Clark could not recall. He denied asking Sleek whether he was going to vote for the Union (an inquiry not attributed to him by Sleek), and testified that Sleek explained he was not for the Union, but was wearing the badge to please his wife. I find that Clark asked Sleek whether he had attended meetings of the Union and that in the circumstances such questioning was violative of Section 8(a)(1) of the Act.

b. Personnel Director Warner and Production Control Manager Shumaker.

On several specific dates, according to the complaint, Personnel Director Warner unlawfully interrogated employees in his office regarding their union sympathies and activities, and on one occasion (August 11) threatened loss of employment and other economic reprisals unless employees abandoned their union activities. It is also alleged that on one occasion Production Control Manager Shumaker engaged in unlawful interrogation.[12]

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[12] As to Warner, the dates involved are April 14, May 6, May 25, June 18 and August 11. The incident involving Shumaker is alleged to have occurred on April 15.

Gloria Ruiz was interviewed for employment by Warner on April 14 and the next day, when she reported for work, Shumaker talked to her in his office. Miss Ruiz testified that in the course of the interview Warner asked whether she wanted a union in the plant or would support or vote for a union. She testified she replied that "at the moment I didn't care." In response to Warner's inquiry she named "some good reasons" for a union and "he named more reasons against." She did tell him that she had belonged to Teamsters Local 20 in Toledo at her former employment. As to the conversation with Shumaker, Miss Ruiz testified he asked her if she wanted or would "precipitate" a union, and what she thought of unions. According to her, she told him she didn't care whether there was a union in the plant or not. She could not recall whether she informed Shumaker of her membership in the Union.

Warner testified that his customary practice, in interviewing an applicant for employment, is to say that he is not "personally interested" in the applicant's feelings about unions, but that the Respondent operated a non-union plant and felt that it could continue to do so and that he hoped that this made no difference to the applicant. If the applicant "wishes to pursue the matter any further, certainly I am willing to engage in a conversation with them." Concerning Miss Ruiz, Warner testified that she "brought the matter up" and "advised me of her membership in Teamsters Local 20 in Toledo," and that he then "pursued this from the standpoint" of inquiring about the contract, whether she enjoyed working with the Union, and what she thought were "some of the benefits" to be derived from unions—"things along that general line." He denied, in general terms, that he ever asked an individual being interviewed whether that per-

son belonged to a union or ever indicated to an interviewee that a person favorable to a union would not be hired. Shumaker was not questioned about his interview with Miss Ruiz.

Dan Ramey, who was an active solicitor for the Union, testified that about June 10, as he was talking to Warner about the possibilities of a job for his wife, Frances June Ramey,[13] Warner asked him whether he had heard anything about organizing activities and how he felt about unions. Ramey replied that he had heard "rumors" and that "there was a guy getting cards signed"; as to his own views, Ramey told Warner that a union "was all right if the Company could afford it." Warner was not questioned about this conversation; I credit Ramey's undenied testimony.

Ada Ramey, the sister-in-law of Dan Ramey, was interviewed by Warner on June 18 as an applicant for employment. She was hired on June 22. It is her undenied testimony, which I credit, that Warner asked her "how my husband and I felt about unions," after commenting that a union was organizing at her husband's place of employment. Mrs. Ramey answered that she did not discuss such matters with her husband and that as for her own views she had never worked in a unionized place and therefore stated "I don't know how I feel about it." Mrs. Ramey was laid off on July 22, as were some other employees. About 2 weeks after the August 6 election, Mrs. Ramey asked Warner how long the layoff would last, as she had an opportunity for another job but would not take it if she were soon to be recalled by the Respondent. In reply to her inquiry, Warner stated, "Well, I advise you

[13] Mrs. Ramey was hired on June 18, 1965.

to go ahead and take the job . . . because due to the Union trouble we're not taking any more orders in the shop." He added, as she testified "that he knew there were quite a few disappointed people in the plant because the Union wasn't in," to which she replied that she "wasn't disappointed at all." Warner then said, "You mean Dannie [Ramey] didn't have any influence on you at all?" She replied that her brother-in-law had not influenced her. Mrs. Ramey was recalled to work by the Respondent during the latter part of September and was working at the time of the hearing.

I perceive no real conflict in the testimony of Miss Ruiz and Warner concerning their interview. Whether or not Miss Ruiz "brought up" the matter of her membership in the Union at her former employment seems immaterial. In any event, on his own version Warner proceeded to probe into her attitude and sympathies toward the Union and unions in general. I find that Warner questioned Miss Ruiz, Dan Ramey and Ada Ramey about their union attitudes and sympathies on the occasions of the separate interviews set out above, and that Production Control Manager Shumaker similarly interrogated Miss Ruiz when she reported for work on April 15. I further find that Warner told Ada Ramey about the middle of August when she asked about possibilities of returning to work following layoff, that she should take other employment because due to "the Union trouble" the Respondent was not taking any more orders, thereby attributing lack of employment opportunity for her to the recent activities of the employees in behalf of the Union. By thus interrogating employees and implying that jobs were not available because of employees' union activities, the Respondent, I find, violated Section 8(a)(1) of the Act.

c. Supervisors Halstead, Rojas and Shively.

Rosemarie Murray, who was active in signing employees and served as an observer for the Union in the August 6 election, testified to a conversation she had with Donald Halstead, time study supervisor, at her work station about 4 days before the election. It appears that she had arranged to be off the week of August 9 on vacation without pay. She testified she asked him if she could still take her vacation, to which he replied that she could take the election week off including Friday, August 6, "providing you don't come in to vote." After she accepted the change she then stated that she did not say or mean that she would stay away from the polls, and Halstead remarked, as she testified, "you're buying your house" and that he would "hate to make a house payment from an unemployment check."

Halstead was not questioned about any conversation with Mrs. Murray concerning the timing of or the conditions under which she could take her vacation. He did testify that in one out of "quite a few conversations" he had with Mrs. Murray "she asked me if all this activity [he assumed she meant union activity] would affect our jobs." He replied that he hoped not, as he had a large house payment to make, and she said, "So do I."

Ellie Marie Messer testified that about 2 weeks before the election Halstead said to her that he had heard she and her husband Martin had "joined up with the Union" and that her brother-in-law, Gordon Messer, "is behind the Union." She told Halstead that she and her husband and brother-in-law were not adherents of the Union.[14] Halstead testified that he did say to Mrs. Messer "that I

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[14] The three Messers had, however, signed union authorization cards prior to this conversation between Halstead and Mrs. Messer.

had heard that she and her husband and brother-in-law were involved in union activities, but I didn't believe it," and that Mrs. Messer answered, "No, it isn't true."

Halstead's statement to Mrs. Murray, whose undenied testimony I credit, that she was buying a house and that he would hate to make house payments out of an unemployment check, in the context in which it was made, was, I find, a veiled threat of reprisal against supporters of the Union. In answer to her inquiry whether she could still take off the week of August 9 for vacation, he offered to let her take the week of the election, including Friday, August 6, the day of the election; when Mrs. Murray indicated acceptance of the change, Halstead added the proviso that she not come in to vote. Mrs. Murray then stated that by her acceptance of the change she did not mean she would refrain from voting; Halstead then made the comment about making house payments from an unemployment check. I find the remark was coercive and violative of Section 8(a)(1) of the Act. I also find that Halstead's admitted comment to Mrs. Messer that he understood she, her husband and her brother-in-law were union adherents—which Halstead carefully testified "was not a question" but "simply a statement"—was designed to elicit a response revealing the Messers' attitude or sympathies toward the Union and, therefore, constituted unlawful interrogation.

The complaint alleged that Foreman Rojas, during the period July 21 to August 5, unlawfully interrogated employees at their work stations. Foreman Rojas, a witness called by the General Counsel, testified at some length about the management meetings concerned with the Company's campaign to defeat the Union, as to which I have made findings in an earlier section of this Decision. Questioned as to his own activities in implementation of

the instructions issued to the personnel attending these meetings, Rojas acknowledged that Personnel Director Warner's instructions were that the supervisors should "try to talk to our people and try to sell the company," but "not to ask the people directly where they stood." He testified that he "never asked any employee directly how they stood or whether they signed union cards," but that he did ask some of the employees, naming Roy Sleek and Donald Johnston, how other employees felt and reported what he had found out at subsequent supervisory meetings. I find that Foreman Rojas did interrogate employees with respect to the union leanings or sympathies of other employees and that thereby the Respondent violated Section 8(a)(1) of the Act.[15]

Frank Ruiz testified that the night before the election, near the stockroom, he and Foreman Ervin Shively had a conversaton during which Shively asked Ruiz, a known union proponent, what he (Ruiz) hoped to gain by a union. When Ruiz answered that he expected to gain higher pay and job security, Shively mentioned a company that had gone bankrupt a year after its employees had organized. Shively testified that he told Ruiz, in answer to the latter's argument that employees would receive more bene-

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[15] In so finding, I have carefully considered the evidence indicating that Rojas was sympathetic to the Union. Thus, he attended one preliminary meeting about June 22 that three other employees had with Eugene Shumaker, the representative of the Union. Also, there is undenied testimony, which I credit, that on the occasion when Nancy Taulker was laid off (about July 21) Rojas remarked to her that "if the Union didn't get in my chances of coming back would probably be slim." In addition, Baltazar Lopez testified that Rojas suggested that Lopez distribute union cards. On the whole, Rojas impressed me as a credible witness and my close observation of him when testifying about the management meetings and his own activity in participating in the Respondent's antiunion campaign convinced me that he was telling the truth in admitting that he asked Roy Sleek and Johnston how other employees felt about the Union.

fits by having a union, "why have a union when you have the benefits you have already got where you . . . could have to start all over if a union came in," and stated that "any company with a union coming in could go bankrupt." I do not view this exchange between Shively and Ruiz as involving an incident of unlawful interrogation, as alleged in the complaint. It appears to me, rather, that Shively impliedly threatened that if the Union came in existing benefits would be jeopardized and employees "could have to start all over" and, in this connection, also expressed the view, as he testified, that "any company could go under because of high wages or large benefits." I conclude Shively's remarks impliedly threatened reprisal if the Union came in, and were thus violative of Section 8(a)(1) of the Act.[16]

d. Activities of Busch, Cogar and DiMasso.

I have found above that the Respondent enlisted Busch, Cogar and DiMasso as agents to sound out employees' union attitudes, to report thereon, and to work actively for the defeat of the Union. These employees were told that they could engage in direct interrogation and, because they were not supervisors, were not circumscribed in their approaches to employees as were the admitted supervisory personnel. Since the Respondent made these key employees its agents, it is, I find, responsible for their conduct where it impinged upon the self-organizational rights of employees.

About a week before the election DiMasso asked employee Alvin Anderson how he was going to vote in the election. Anderson replied he was voting for the

[16] Inasmuch as this incident was fully litigated, I find the variation between the allegation in the complaint and the proof to be harmless.

Company, although he testified that was not the way he felt. Anderson's testimony is undenied, and I credit it. DiMasso admitted that he talked to employees at the stockroom window and acknowledged that he asked employee Lopez how he was going to vote. Employee John Ford testified that about 10 days before the election Busch asked him what he thought about "this election, the Union"; when Ford answered noncommitally Busch asked Ford if he did not agree that "It's a bunch of these young kids wanting to act smart." Busch did not deny the conversation; he testified that the election "was on the tip of everyone's tongue," and that he probably said to Ford "something like, 'Well, how does the picture look to you, John.' " Robert Sabo, whose enrollment in an apprenticeship program partially sponsored by the Respondent entitled him to draft deferment, testified that a day or two before the election Busch engaged him in a conversation about the Union and his draft status, during which Busch intimated that Sabo might lose his right to attend apprenticeship school if the Union came in. Busch could not recall anything being said about Sabo's draft status but acknowledged that he did ask Sabo "how he stood and was coming on his apprenticeship program." I credit Sabo's testimony and find that Busch did state that Sabo's participation in the program would be jeopardized if the Union were selected.

Employee Daniel Nagy, still employed by the Respondent, credibly testified without contradiction that a few days after signing a union card on July 8 Cogar, then acting as foreman in place of George Whyte, stated that if the Union got in wages and jobs would be cut and also "said there won't be no apprenticeship class, and maybe the whole plant might just close down." According to employee Ford, on the Saturday before the election Cogar

stated, with reference to the upcoming election, "I see you're going to vote the overtime out"; when Ford asked Cogar why he said that Cogar responded, "Well, if the union comes in, I don't think you will get any more overtime." Also on that day Cogar told Ford, "We know who is going to vote for the Union and who isn't going to vote for the Union." Cogar could not recall having any conversation with Ford concerning overtime or union activity. Ford, still employed by the Respondent, impressed me as a truthful witness, and I credit his testimony.

I find that by the following conduct of DiMasso, Busch and Cogar the Respondent, having constituted them agents to engage in combating the Union, violated Section 8(a)(1) of the Act: DiMasso's questioning Anderson and Lopez how each was going to vote; Busch's questioning of Ford as to his union attitude, and his statements to Sabo that Sabo's participation in the apprenticeship program would be jeopardized by selection of the Union; Cogar's statement to Nagy that wages and jobs would be cut, the apprenticeship class discontinued and the entire plant might be closed if the Union got in; Cogar's statement to Ford that overtime would be reduced or eliminated if the Union prevailed; and the remark by Cogar to Ford that the Company knew how employees were going to vote in the election, thereby reasonably creating the impression that employees' union activities were under surveillance.

B. *The refusal to bargain.*

1. The appropriate unit.

The complaint alleged that the following unit was and is appropriate within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed at the Employer's Gibsonburg, Ohio plant, including

shipping, receiving, stockroom and tool room employees, truckdrivers, draftsman, and working group leaders, but excluding office clerical employees, time study methods employee, and all guards, professional employees, and supervisors as defined in the Act.

In its answer the Respondent admitted that this was the unit agreed upon by the parties in the consent election agreement executed on July 27; it denied, however, that the above unit description "has any validity outside of the context" of the consent election agreement and asserted that the unit so described differs from that set forth in the Union's letter of July 15 requesting bargaining. The record shows, and no evidence was adduced to the contrary, and I accordingly find, that the above unit is appropriate. The unit set forth in the Union's letter of July 15 is phrased in slightly different words, but is not materially different. The parties encountered no real difficulty in reaching agreement on the unit description contained in the consent election agreement and there is no evidence that there is any variance either in terms of total employees covered or specific employees included and excluded, between the unit description in the Union's letter and that contained in the consent agreement and in the complaint. I find that the unit set out above is appropriate within the meaning of Section 9(b) of the Act.

2. The Union's majority status.

The Union made its demand for recognition at about 2 p.m. on July 15, followed by a letter dated the same day which was received by the Respondent on July 16. Personnel Director Warner, in the July 15 telephone conversation with Sarver, business representative of the Union, declined to recognize the Union and confirmed this by letter

dated July 19. The critical date for determining whether the Union represented a majority is July 15, the date upon which it made its demand and was refused recognition.

In connection with the consent election agreement the Respondent submitted a list of employees within the stipulated unit who were on its payroll for the period ending July 17. This list (in evidence as part of General Counsel's Exhibt 21), as corrected [17] contains a total of 169 employees in the unit as of July 15. In order for the Union to have a majority, therefore, there must be at least 85 valid authorization cards.

In support of its representation petition filed on July 21 the Union on July 20 mailed to the Board's Regional Office 88 authorization cards and a typewritten alphabetized list of the names on these cards (General Counsel's Exhibit 23), which were received and date-stamped by the Regional Office on July 21. According to the undenied testimony of Shumaker, business agent of the Union, which I credit, all the cards so submitted and listed (with the exception of the card of Longino Mendoza, dated July 16 and received by the Union that day) were in the possession of the Union on July 15 when the demand for recognition was made. Shumaker further testified that on July 16, when the cards were turned over to a secretary to prepare the alphabetized list, he had three other cards (those of Dwayne Clabaugh, Salvator DiMasso and Larry Stevens); he did not, however, submit them to the Regional Office because these individuals had written to the

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[17] The list shows Jerry Binder as resigned on July 15. In fact, it was agreed and Binder so testified, that Binder resigned as of the end of his shift on Friday, July 16. Dwight Wilson, also on the list, in fact was terminated on June 28. Thus Binder is included and Wilson excluded as of July 15 in considering the number of employees in the unit.

Union in effect revoking their cards.[18] The General Counsel concedes that William Gengrich and Dwight Wilson, whose names are on the alphabetized list submitted by the Union but whose cards were not offered in evidence, were terminated prior to July 15, and that Mendoza's card was received subsequent to the July 15 demand. However, the General Counsel contends that the cards of Clabaugh, DiMasso and Stevens are to be counted as valid because the revocations of these employees were not received by the Union prior to July 19. To summarize, the General Counsel's position is that as of July 15, 88 employees out of the total of 169 in the unit as of that date had designated the Union as their collective-bargaining representative.[19]

The Respondent advances a number of contentions, both general and specific, against the validity of many of the cards. Thus it asserts that some cards were obtained by representations that they were only for the purposes of obtaining an election or on the misrepresentation that all or most other employees had signed; other cards are said to be invalid because of failure to establish the authenticity of the signature or the date on which signed; and in other instances it is claimed that the card cannot be counted because the signer revoked his designation. In the sections which follow, I deal with these contentions as they apply to the cards of specific employees.

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[18] I consider below whether the cards of Clabaugh, DiMasso and Stevens are to be counted toward the Union's majority as of July 15.

[19] From the alphabetized list of 88 employees (GC Exhibit 23) the General Counsel excludes Mendoza, Gengrich and Wilson and adds to that list Clabaugh, DiMasso and Stevens, for the reasons indicated.

a. Cards allegedly invalidated because of representations.

In its brief, the Respondent attacks the validity of 15 cards on the ground that the signatures thereon were obtained (in 13 instances) "on the basis that the purpose of the card was specifically that of obtaining an election" or (in 2 instances) "on the basis that everyone else had signed."

1. *Gregory Boltman* testified that he signed his card (GC Exhibit 2 AX)[20] on July 1, the date appearing thereon, at the solicitation of his friend Phillip Fogle while in the Company's parking lot during a break period. On cross-examination Boltman was first asked whether when he signed any reason was given him for signing and he answered: "No. I was under the impression that it was to get the Union in the factory, and I thought they had a right to get one if they wanted one." He also stated that neither Fogle nor another employee present when he signed talked about the need for having an election, although he added that he did not remember what was said. He later testified that he told Fogle that he "would sign to have a vote," and on redirect examination answered somewhat hesitantly "I think so" when asked whether Fogle stated that the only purpose for signing the card was to get a vote. Boltman testified that he read the card before he signed. I find that Boltman's recollection of what was said to him by his friend Fogle as to the reasons for signing the card was too vague to warrant the conclusion that Boltman signed because he was told that the card was only for the purpose of obtaining an election. I believe his initial statement, that the card was "to get the Union in the factory," an objective with which he in-

[20] For convenience, I will in the consideration of specific cards indicate as above the exhibit number of the particular card under discussion.

dicated agreement, more closely approximates what was said to him. I find Boltman's card to be valid.

2. *Patricia Ickes* (GC Exhibit 2 BE) and her husband, *Richard Ickes* (GC Exhibit 2 BF), each identified the signature on the card they signed June 13 at the solicitation of Glen Blevins, a fellow employee. Mrs. Ickes first testified that Blevins gave no reasons why she and her husband should sign a union card, but then acknowledged that in answer to a pretrial questionnaire from the Regional Office she stated that the person who solicited her card asked if she and her husband "were interested in signing a card so that the Union could come in for a vote." She testified, however, that she did not believe Blevins stated the cards would be used only to get a vote. Mr. Ickes was not questioned regarding any statements made to him by Blevins. I find that no statement was made by Blevins to Mr. and Mrs. Ickes, that the sole purpose of signing the card was to obtain an election. Their cards are valid.

3. *Baltazar Lopez* (GC Exhibit 2 BJ) signed his card on July 12, at the solicitation of employee Donald Johnston. Lopez testified that Johnston gave him no reason for signing the card and he could not remember hearing Dan Ramey, who was active in soliciting cards, say that the cards were for an election. Lopez' card, I find, is valid.

4. *Jerry Mason* (GC Exhibit 2 BK) signed his card on July 10 and mailed it to the Union. He could not recall, in testifying, from whom he got the card, which he obtained about a week before he signed. In Mason's prehearing affidavit, the following appears:

> As I recall all the agent told me was that I should read over the card and if I was interested I should sign it and mail it back to the Union. He said that if enough employees were interested we would have an election.

That's all he said. He did not say that the cards would be used only for the purpose of securing an election of the employees.

I find Mason's card to be valid.

5. *Gordon Messer* testified that he signed and dated two cards (GC Exhibit 2 ED, dated June 12, and GC Exhibit 2 BL, dated July 9). The June 12 card, which bears the Board's date stamp of July 21, was signed at the solicitation of Blevins, who stated that "If enough cards were signed there may be an election." Later, upon learning that Blevins had not turned in the card, Messer signed and mailed the card dated July 9 to the Union. It is postmarked July 9. I find both cards to be valid.[21]

6. *William Nagel* (GC Exhibit 2 BO) testified he signed his card on July 7 (the date appears to me to be "7/9/65") and mailed it to the Union. It bears a postmark of July 10. During the period of several days that elapsed between the time he got the card and signed it, no union representative spoke to him about signing the card, although he and some friends did mention in conversation that "a certain number of cards"—the percentage he could not recall—were needed for an election. I find that no representation was made to Nagel that would warrant rejecting his card, and I find it is valid.

7. *Robert Sabo* (GC Exhibit 2 L) signed his card on June 28, at the solicitation of Frank Ruiz. Sabo testified that Ruiz told him, before he signed the card, that cards from 80 percent of the employees were needed in order to

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[21] The Respondent questioned whether Messer in fact signed the cards, and for comparison purposes introduced specimens of Messer's signature on W-4 forms. While the signatures on the cards appear to be in less labored script than the other writing attributed to Messer, I credit his testimony that he signed the cards.

obtain an election. I find nothing in this statement to indicate that Sabo was told that the sole purpose of signing the card was to secure an election. The card is valid.

8. *Brenda Seymour* (GC Exhibit 2 AH), whose card, dated July 11, was identified by Rosemarie Murray who solicited Seymour's signature, testified that when Mrs. Murray asked her to sign she made some reference to the number of cards needed to hold an election. After hearing the July 14 speech of Personnel Director Warner, in which he accused the Union of not "being entirely honest" in its solicitation campaign, Mrs. Seymour on July 21 mailed a letter to the Union resigning (Respondent's Exhibit 12). I find Mrs. Seymour's card can be validly counted toward the Union's majority as of July 15 and that no invalidating representation was made to her when she signed it.

9. *Lillie Sleek* (GC Exhibit 2 CA) signed her card on July 8, at the request of her husband, Raymond Sleek. On cross-examination she testified her husband "said that they needed so many percent of cards" for an election and answered affirmatively when asked if she signed "for that reason . . . to have an election." On redirect she testified as follows:

> Q. (By Mr. Goubeaux) Mrs. Sleek, did your husband ever tell you the only purpose of those cards was to get an election?
>
> A. Yes.
>
> Q. He did tell you that?
>
> A. Yes.
>
> Q. When did he tell you that?
>
> A. On the night I signed the card.

Mrs. Sleek later testified that "all I remember is that he told me that if so many of these cards were signed . . . the union could come in for an election," and that she did not remember what her husband said to persuade her to sign the card.

10. *Raymond Sleek* signed two cards, one dated June 11 (GC Exhibit 2 CB) and the other undated but stamped as received in the Regional Office on July 21 (GC Exhibit 2 EK). The first card was signed at the Union's hall and given by Sleek to Dan Ramey; because Sleek could not remember whether the first card was one for the Union, he later signed the other card (undated) which he received from Frank Ruiz. The latter card was signed at home. Sleek testified he told his wife, Lillie, that he "had gotten two cards and I asked her about signing and she wasn't too sure about it until I had signed mine," and that he further told her that Ruiz had indicated that a certain percentage of cards was needed for an election. Sleek testified further that he was not present when his wife signed her card, and estimated that she gave the filled out card to him about 2 days after he last asked her to sign. After receiving her executed card, Sleek delivered it and his own to the union hall.

Considering the testimony of Lillie and Raymond Sleek, I am persuaded and find that Sleek signed a card early in the campaign and thereafter, uncertain that this card was for the Union, signed another but failed to date it. This second card, as well as another card which his wife signed on July 8, were both delivered by him to the Union within a few days of July 8 and prior to July 15. I think it most probable that Sleek told his wife, as he had been told by Ruiz, that in order for there to be an election a stated percentage of cards was needed, and I so find. I discount Mrs. Sleek's ready affirmative answer to General Counsel's question whether her husband told her at any time that "the only purpose" of the cards was to get an election, because when asked to state, on her own, what he told her she twice testified (before and after answering that the "only purpose" for the cards given by her hus-

band was an election) that if enough cards were signed the Union could obtain an election. I therefore conclude that the cards of Lillie and Raymond Sleek are valid.

11. *Dale Stein* (GC Exhibit 2 CD) acknowledged the signature on his card, which is dated July 9. Although he could not be sure of the exact date that he signed he testified that it was during the first week in July and before he was daid off, which was on July 16. According to Stein, Roy Sleek, who solicited his signature, stated that after a certain number of cards were signed there would be an election. Stein testified that about a week "after I turned the card in" he wrote to the Union (GC Exhibit 3) resigning. The letter of resignation is postmarked July 19. I find that Stein's card is valid as of July 15 and that no representation was made to him that it was only for the purpose of an election.

12. *Nancy Taulker* (GC Exhibit 2 AI) testified that Gloria Ruiz gave her a card at work and stated "that she had to have so many cards signed before they could have a vote." Mrs. Taulker took the card home and later signed it, with no one present, after telling Mrs. Murray, who had called on her about signing, that "I would fill one out and I would give it to her the next day, so I did." Mrs. Taulker's card is dated July 8.[22] I find Mrs. Taulker's card to be valid, that it was signed on the date appearing thereon (July 8) and that no representation was made to her that the only purpose of the card was to obtain an election.

13. *Clarence Eversole* (GC Exhibit 2 T) testified that he signed his card, which is dated July 13, at the solicita-

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[22] I accept Mrs. Taulker's testimony about the circumstances under which she signed the card rather than Mrs. Murray's account which is that Mrs. Taulker signed in her presence at the same time that Norma Ault did.

tion of Dan Ramey.[23] Eversole, a witness for the Respondent, testified that Ramey told him, "you might as well sign it. . . . Everybody else has or quite a few of them have." Eversole further stated that he did not believe anything was said about needing the card for an election. Ramey's recollection was that he asked Eversole if he wished to sign a card "so we could have an election." Eversole testified he never attempted to withdraw his card. I find no invalidating representation in this instance, and I conclude that Eversole's card is valid.

14. *James Probst* (GC Exhibit 2 BR) identified the signature on his card, which is dated July 8, and testified he was not solicited by anyone to sign. He mailed the card to the Union. It is postmarked July 9. After signing, he heard discussion about how many cards were needed for an election, but he "didn't pay too much attention to it." Plainly there is no evidence of any improper inducement or representation having been made to Probst. I find his card is valid.

b. Cards allegedly invalid because of insufficient authentication or lack of dates.

In a number of instances the Respondent contends that cards cannot be accepted as valid because of insufficient authentication and for failure to establish, particularly in the case of undated cards, when they were signed. The cards relied upon by the General Counsel as to which such questions are raised either specifically by the Respondent or due to seeming ambiguities in the testimony, are considered in this section.

1. *Charles Adams* (GC Exhibit 2 AS) identified the signature on his card, which is undated and bears the

[23] Ramey testified to the same effect.

Regional Office date stamp of July 21. He testified that he signed at the solicitation of Frank Ruiz, on a payday at Seifert's bar where he and other employees customarily cashed their checks. He fixed the time as "probably after" July 4, and testified that two other employees, Paul Cooper and Gary Noss, signed their cards at the same time. Ruiz testified that he solicited Adams at the same time as he obtained Cooper's signature at Seifert's bar and that he saw Cooper place the date, July 9 (a Friday), on the card bearing Cooper's name. Ruiz further testified that Noss was present but that Noss did not then sign a card because he had previously successfully solicited Noss, which agrees with the date (June 25) on the card of Noss. I find that Adams signed the card the same date as Cooper signed his, July 9, and that the card is valid.

2. *Alvin Anderson* (GC Exhibit 2 AT) identified his signature and testified that he signed the card, which is undated, "in June, when it was first started," at the solicitation of Glen Blevins. Testimony of other witnesses establishes the Blevins' activity in soliciting cards occurred at the outset of the Union's campaign. Moreover, Alvin's father, Robert Anderson, testified that the card he authorized his wife to sign for him (GC Exhibit 2 AU), which is dated July 12 and postmarked July 13, was brought to him by Alvin. I credit Alvin's testimony, which is uncontradicted and plausible, and find that he signed his card during June. I find it to be valid.

3. *Robert Anderson* (GC Exhibit 2 AU), who cannot read or write, testified that he authorized his wife to fill out his card and sign his name, that he personally placed thereon the mark "x" which appears on the signature line, and that he mailed the card. The date on the card is July 12 and it bears a July 13 postmark. I credit Ander-

son's testimony, which is undenied, and find that his card is adequately authenticated and is valid.

4. *Jerry Eschedor* (GC Exhibit 2 D) was not a witness; the undated card bearing his name was identified by Ruiz. According to Ruiz' credited testimony, Eschedor signed in his presence during "the early part of the campaign," in the car of Gary Noss in the Company's parking lot, after Ruiz had signed his own card (June 22) and about the same time as Douglas Bishop signed (Bishop's card is dated June 25). I perceive no reason to doubt Ruiz' testimony regarding the time and circumstances of his solicitation of Eschedor's card; in this connection I note that of the 13 cards he identified other than his own, all except Eschedor's are dated and most of them bear dates during the last week of June. I find that the card of Eschedor is valid and was signed about June 25.

5. *Gregory Kasch* (GC Exhibit 2 BG), *James Olmstead* (GC Exhibit 2 AR), *Johnny Riffle* (GC Exhibit 2 BX), and *Gerald Walp* (GC Exhibit 2 CL) did not appear as witnesses because they were in the military service. There is no question as to their being employed and in the unit on the critical date, July 15. Cards purportedly signed by them, all dated prior to July 15 and bearing the Regional Office date stamp of July 21, were received in evidence and are relied upon by the General Counsel in support of the Union's majority.

With respect to the card bearing Kasch's name, dated July 3, Mary Hauck, his mother, credibly testified that the signature thereon was in her son's handwriting. It was stipulated that if called as a witness Kasch would testify consistent with a completed questionnaire received from him by the Regional Office, in which he acknowledged the signature as his own and answered affirmatively that he

signed on the date shown on a copy of card sent to him. It was also stipulated that the signature on a W-4 form bearing Kasch's name was his. I find that the signature on the three exhibits bearing the name of Kasch appear to be in the same handwriting; accordingly, I find Kasch's card valid and authentic.

Nancy Tillman, the sister of Olmstead, identified the signature on the card bearing his name as that of her brother, dated July 9. In addition, she identified the envelope of a letter she received from Olmstead, postmarked August 24, as bearing her brother's signature in the return address space. The parties agreed to the authenticity of Olmstead's signature on his W-4 form. Comparing these signatures, and crediting Mrs. Tillman's testimony, I accept the card as validly signed by Olmstead.

Mrs. Meda Riffle credibly testified that all the writing on the card bearing her son's name, dated July 12, was in his handwriting. After comparing the signature on the card with the signature on Riffle's W-4 form, which was stipulated to be his, I find they are in the same writing, and I conclude that Riffle's card is valid.

With respect to Walp's card, dated July 7, Mrs. Clara Walp, his mother, called as a witness by the General Counsel, declined to state whether the signature on the W-4 form bearing his name was in her son's handwriting. However, it was stipulated that the signature thereon was his, and also that Walp would testify if called consistent with the returned questionnaire sent him by the Regional Office, in which he acknowledged that the signature on the copy of the card sent with the questionnaire was his and that he signed the card on the date shown thereon, July 7. After having compared the signatures on the three documents, I stated on the record that they appeared to have been signed by one and the same person, a view I adhere

to after further comparison. I find that Walp's card was properly authenticated and that it is valid.

6. *James Powell* (GC Exhibit 2 BQ) testified credibly that he signed his card, which is undated, "in the beginning, when they started the Union activities," at the solicitation of his half-brother Douglas Bishop. Bishop's card, solicited and identified by Ruiz, is dated June 25. Powell testified further that he mailed the card to the Union. I find that Powell's card is valid and that he signed it and delivered it to the Union prior to July 15.

7. *Joseph Reineck* (GC Exhibit 2 BU) credibly testified that he signed his card, which is undated, "right when the Teamsters were first organizing," and that he did so about 2 weeks before Dale Stein, whose card is dated July 9, signed his. He credibly testified that he gave the card to Frank Ruiz. I find that Reineck's card is valid and that it was signed by him late in June and in any case prior to July 15.

8. *Frances June Ramey* (GC Exhibit 2 BT), the wife of Dan Ramey, testified that she printed her name on the card on the date, June 24, shown on the card. She testified that she could give "no real reason," for printing rather than signing, but affirmed that she intended to designate the Union as her bargaining agent. I find her card is valid.

9. *Jerry Aldrich* identified his signature on two cards bearing his name, one dated July 2 (GC Exhibit 2 Q) and the other dated July 16 (GC Exhibit 2 EE). He testified that he signed the July 2 card at Seifert's bar, dated it and gave it to fellow employee Mendoza. The card bears the Regional Office date stamp, July 21. Subsequently he signed the other card at the solicitation of Ramey, in order "to make sure they got one," in Ramey's car. Ramey, who

preceded Aldrich as a witness, identified Aldrich's signature upon being shown the July 2 card (he read the date as July 24) and stated that Aldrich signed it in his (Ramey's) car. Ramey was not questioned about the July 16 card bearing Aldrich's name. I believe the testimony of Aldrich, since he would more likely have a clearer recollection of the sequence in which and for whom he signed two cards, and conclude that he did sign the July 2 card on the date indicated, and thereafter on July 16, signed another card. I find the July 2 card to be valid.

10. *Robert Purney* credibly testified that he signed two cards and identified his signature, one being dated July 1 (GC Exhibit 2 EA) and the other dated July 8 (GC Exhibit 2 BS). He explained that at the time he signed the July 1 card he did not have his social security number with him, and therefore later filled out and mailed the July 8 card (which is postmarked July 9) to the Union. I credit his testimony. Purney further testified that when he signed his card on July 1 two other employees, *Thomas Claussen* and *Lynn Schliefert*, who were riding in his car, signed their cards and that he saw them sign. They then drove to the home of Frank Ruiz and delivered the cards to Mrs. Ruiz. Claussen's card (GC Exhibit 2 EB) and Schliefert's card (GC Exhibit 2 M) are both dated July 1.[24] I find that the two cards of Purney, dated July 1 and July 8, and the cards of Claussen and Schliefert, dated July 1, are valid. Because of incomplete identification, I do not rely on the July 8 card for Claussen.

11. *Richard Goetz* credibly testified that he signed two cards, one dated June 25 (GC Exhibit 2 EC) and the

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[24] Another card bearing Claussen's name (GC Exhibit 2 B), dated July 8 and postmarked July 9 addressed to the Union, was received in evidence, although Purney did not see Claussen sign that card.

other dated July 10 (GC Exhibit 2 BC). The latter card he mailed to the Union and it is postmarked July 10, having given the first card to Ramey. I find that both cards are valid.

12. *Tex Sleek* credibly testified that he signed his card (GC Exhibit 2 CC) on the first day of his employment, July 9, after work, and that he gave it to his brother, Roy Sleek. In the date space the figures "7/9/65" appear, the "7" and the "65" being in ink and the "9" in pencil. The name and address of the employer are also in ink, while the balance of the writing on the card is in pencil. Sleek testified, credibly as I find, that the writing in ink was on the card when he received it from his brother and that he personally wrote his name and the balance of the card in pencil. I find that the card is valid.

13. *Richard Keesbury* testified he signed his card (GC Exhibit 2 AE) on July 12. In the date space the card shows the figures "12/7/65." He credibly testified that he placed the day of the month before the month because of a habit acquired in the military service. The card bears the Regional Office date stamp of July 21. I find the card was signed on July 12 and is valid.

14. *Claude Maynard* testified that he signed two cards, one undated (GC Exhibit 2 EJ) and the other dated July 9 (GC Exhibit 2 AQ) which he mailed to the Union. The latter card bears a July 11 postmark. He credibly testified that he signed and mailed the second card because he "didn't know positively" whether Gilbert Flores, a fellow employee to whom he gave the first card which he had signed "pretty close" to July 1, had turned the earlier card over to the Union. I find that Maynard signed the undated card about July 1 and thereafter signed the card dated July 9. Both cards are valid.

15. *Thomas Heineman* testified that he signed two cards for the Union. One card (GC Exhibit 2 EH), which he testified he signed at the solicitation of Ramey after being told by Ramey that the writing on an earlier card Heineman had signed and given to Ramey had been obliterated because it had been run through a washing machine, bears the date "15 July 65." Another card bearing Heineman's name (GC Exhibit 2 G), dated "25 June 65," was identified by Ruiz, before Heineman testified, as having been signed by Heineman at the solicitation of Ruiz. It bears the July 21 Regional Office stamp. Ruiz further testified that he obtained only one card from Heineman which was early in the campaign, and that Heineman used a pen supplied him by Ruiz which "didn't write too well" with the result that Heineman "had to go over" the signature. Ruiz also stated that after Heineman signed he (Ruiz) "heard later on that somebody else signed him up, too." Heineman testified that he "usually" wrote dates in the manner appearing on both cards, with the day of the month preceding the month, and that on each card the date portion appeared to be in his handwriting. He acknowledged that the signature on the July 15 card was his, but stated that the signature on the June 25 card, "especially the last name"—in which the letters of the last name appear to have been retraced—"doesn't look like my writing." Heineman was not asked whether he signed a card at the solicitation of Ruiz, but did state that it was possible that he signed three cards. Later, Heineman mailed a letter, dated July 19, to the Union asking that it be treated as "my official resignation from Teamsters Union Local 20."

I conclude that both cards bearing Heineman's name were signed by him. The signatures on both cards (except possibly the last name on the June 25 card which ap-

pears labored and retraced) have common characteristics, and both cards are dated in the manner "usually" done by Heineman. Plainly the June 25 card cannot be the only other card he signed, accepting his testimony that he signed two cards for Ramey and that the first went through a washing machine. I credit the undenied testimony of Ruiz that he signed Heineman early in the campaign because he knew him well and that the pen used by Heineman was faulty and necessitated retracing some of the writing. I find both cards to be valid as of July 15, and that his resignation was not effective until after July 19 when received by the Union.

c. Cards allegedly revoked.

1. *Dwayne Clabaugh* (GC Exhibit 2 AZ) admittedly signed the undated card bearing his name. He testified he did so at a union meeting, and fixed the time as "either the last week of June or the first week of July." Since Clabaugh testified that this was a union meeting attended by DiMasso, who went to only one meeting, Sunday, July 11, at which he signed his card, I find that Clabaugh signed his card on July 11.

2. *Salvator DiMasso* (GC Exhibit 2 R) signed his card, as he testified, at the July 11 meeting, although he misdated it August 11. On July 15, DiMasso typed out and signed a letter to the Union stating that he did not "accept membership" in the Union. Clabaugh, to whom DiMasso showed a copy of his letter of "resignation," signed a carbon copy. DiMasso mailed the two documents to the Union, but could not remember when he did so. Shumaker, business agent of the Union, testified that the Clabaugh and DiMasso resignations were received on Monday, July 19. I so find.

I conclude that the authorization cards of Clabaugh and DiMasso were signed on July 11 and that the revocation of the cards was effective on July 19, when the letters revoking them were received by the Union. Accordingly, I further find that the cards were valid on July 15 when the Union made its demand for recognition and are, therefore, to be counted toward the Union's majority on that date.

3. *Larry Stevens* (GC Exhibit 2 CI) identified his signature on the card bearing his name. He signed on July 13 and testified that he gave the card to another employee, Harold Grove, "a couple of days" after signing it—"about the 16th or 17th" of July. The record does not disclose when the card came into the Union's possession, although Shumaker testified that he had the cards of Clabaugh, DiMasso and Stevens on July 16, when his office girl began preparing the alphabetized list of cards for submission to the Regional Office. A resignation from Stevens was, I find, received by the Union not later than July 20, the date the cards and the list were mailed to the Regional Office. I conclude that the evidence with respect to Stevens' card fails to establish that this card was in the possession of the Union on July 15, since Stevens testified that as much as "a couple of days" elapsed between the date he signed it (July 13) and when he gave it to Grove. Accordingly, I find that the card of Stevens may not be counted toward the Union's majority on July 15.

d. Conclusions as to majority.

In the preceding sections I have considered the authorization cards of 38 employees out of the 88 cards relied upon by the General Counsel and have found that 37 of these are valid and that the remaining card, that of Larry Stevens, must be excluded as it was not shown to

have been in the Union's possession on the critical date, July 15. In addition to the foregoing 37 valid cards I find that 50 other employees, whose cards were authenticated by the credible testimony of themselves or others who witnessed the signing, had executed valid authorization cards which were in the Union's possession on July 15.[25] Thus the Union had on that date valid cards from 87 employees out of a unit consisting on that date of 169 employees, and therefore represented a majority.

3. The defense of "good-faith doubt."

In my opinion, the record herein affirmatively establishes that the Respondent, in refusing to bargain with the Union, was motivated, not by a good-faith doubt of the Union's majority status but, to the contrary, by a rejection of the collective-bargaining principle. Before the Union made its demand for recognition on July 15 the Respondent, in the speeches of President Clark and Personnel Director Warner on July 10 and 14, respectively, had made clear to employees that it was opposed to the organizational efforts of the Union and charged that the Union, by obtaining signatures to cards which provided that the signatory accepted membership in the Union and authorized it to act as collective-bargaining representative, was not "being entirely honest" and was "trying to avoid an election." In replying to the Union's oral and written demand for recognition, the Respondent confined itself to referring the Union to the Board and did not comment upon the

[25] There are 88 names on General Counsel's Exhibit 23, the alphabetized list, and I find that for 85 there are in evidence valid cards. No cards were introduced for Gengrich or Wilson, as they had been terminated prior to July 15, and the card of Mendoza is not counted as it was received on July 16. Not on the list, but entitled to be counted as valid cards, are those of Clabaugh and DiMasso.

Union's offer to submit its cards to an impartial third-party check or explain why such procedure was unacceptable. At the supervisory meeting the night of July 16 Clark did not discuss the Union's offer of a card check; he and Warner had already decided upon an "active campaign" to defeat the Union. Clark remarked to the supervisors that the Respondent was "not going to negotiate with just a letter or a phone call," and stated that the Respondent could win an election if the employees were exposed, to use Warner's words, to "an active campaign of education, information and persuasion" to convince them "to vote no Union."

As found above, the Respondent did engage in a systematic campaign, through supervisors and key nonsupervisory employees, during the period from July 21 to the election on August 6, of questioning employees as to their union sympathies, obtaining reports from the supervisors and key employees on employee sentiment, and disseminating information on company benefits and arguments against union representation. At the same time, the Respondent promulgated a rule, which I have found was for a discriminatory purpose and violative of the Act, against union solicitation and distribution of union literature. Moreover, during this period certain supervisors and agents of the Respondent, as found above, made coercive statements to employees and unlawfully threatened reprisals.

In view of the extensive unfair labor practices in which the Respondent engaged, principally concentrated in the 3-week period following the Union's demand for recognition and offer to prove majority through a card check; I am convinced that the Respondent rejected the request to bargain in bad faith and not because of a good-faith doubt that the Union represented a majority. In-

deed, the purpose of the Respondent's antiunion campaign was to destroy whatever support the Union had among the employees and, as Warner's written instructions to the supervisors and key employees charged with accomplishing this result make clear, to insure that "we will have a majority *No Union* vote when the election results are finally posted." I therefore conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union on July 15 and thereafter.[26]

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of the Respondent found to constitute unfair labor practices as set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy.

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (5) of the Act, it will be recommended that the Respondent cease and desist therefrom and take appropriate affirmative action, including bargaining upon request with the Union, in order to effectuate the policies of the Act.

REPORTS AND RECOMMENDATIONS AS TO CASES NOS. 8-RC-6028 AND 8-RM-428.

In its Order of November 3, the Board directed, with respect to the representation cases, that a hearing be held

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[26] *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. 185 F. 2d 732 (C.A. D.C.), cert. denied 341 U. S. 914.

"to resolve the issues raised by the Union's. Objection No. 2, paragraphs 1 through 6, and 9 through 14." It further found it "unnecessary to reach the merits of Objection 1 at this time" and, with respect to Objection No. 2, paragraphs 7, 8 and 15, adopted the Regional Director's recommendation that these objections be overruled. The issues raised in the Union's objections on which hearing was directed, generally encompass the conduct occurring within the period following the filing of the Union's petition on July 21 and the election on August 6, which I have in preceding sections of this Decision found to be violative of Section 8(a)(1) and (5) of the Act. In particular is this true of the systematic campaign to identify union adherents and to destroy the Union's majority, which the Respondent pressed with vigor from July 21 until the election on August 6, which conduct is embraced in Objection No. 2, paragraphs 1 through 6. I find that these objections have been sustained to the extent I have heretofore found the Respondent's conduct in connection with the campaign to be violative of the Act. Except for the statement by Supervisor Halstead to Mrs. Murray, that she could take the week of the election for vacation if she did not come in to vote, which I have found to violate Section 8(a)(1) and which is covered in paragraph 10 of Objection 2, the remaining paragraphs (paragraphs 9, and 11 through 14) either were not proved or relate to conduct that occurred prior to the filing of the petition on July 21 and thus cannot form the basis for valid objections.[27] In view of the objections which I find meritorious and my recommendation that the Respondent bargain upon request with the Union because of its unlawful refusal to bargain in violation of Section 8(a)(5), I recom-

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[27] See *Goodyear Tire and Rubber Co.*, 138 NLRB 453.

mend that the Board sustain the objections to the extent indicated, set aside the election held on August 6, 1965, and dismiss the petitions in Cases Nos. 8-RC-6028 and 8-RM-428.

Upon the basis of the above findings of fact and upon the entire record in these proceedings, I make the following:

CONCLUSIONS OF LAW.

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at the Respondent's Gibsonburg, Ohio, plant, including shipping, receiving, stockroom and tool room employees, truckdrivers, draftsman, and working group leaders, but excluding office clerical employees, time study methods employee, and all guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since July 15, 1965, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By refusing on and after July 15, 1965, to recognize and bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, the Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

6. By unlawfully questioning employees as to their own or fellow employees' union sympathies and leanings, threatening economic reprisals because of union activities, conditioning job advancement upon abandonment or renunciation of union activity, creating the impression of surveillance of union activities, and by promulgating, maintaining and enforcing a no-solicitation and no-distribution rule for discriminatory purposes, the Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER.

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record herein, it is recommended that the National Labor Relations Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, order that the Respondent, Atlas Engine Works, Inc., Gibsonburg, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers Local #20, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the following appropriate unit:

All production and maintenance employees employed at the Respondent's Gibsonburg, Ohio, plant, includ-

ing shipping, receiving, stockroom and tool room employees, truckdrivers, draftsman, and working group leaders, but excluding office clerical employees, time study methods employee, and all guards, professional employees, and supervisors as defined in the Act.

(b) Unlawfully questioning employees as to their own or fellow employees' union sympathies and leanings, threatening economic reprisals because of union activities, conditioning job advancement upon abandonment or renunciation of union activity, and creating the impression of surveillance of union activities.

(c) Discriminatorily promulgating or enforcing a rule prohibiting employees from soliciting or distributing literature on behalf of a union, or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all the employees in the unit described above, concerning rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Rescind its no-solicitation no-distribution rule posted on July 22, 1965, as it applies to union solicitation or other activities protected by Section 7 of the Act.

(c) Post at its plant in Gibsonburg, Ohio, copies of the notice attached hereto and marked "Appendix."[28] Copies of said notice, to be furnished by the Regional Director for the Eighth Region, shall, after being duly signed by a representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Eighth Region, in writing, within 20 days from the date of receipt of this Decision and Recommended Order, what steps the Respondent has taken to comply herewith.[29]

Dated at Washington, D. C.

IVAR H. PETERSON,
Trial Examiner.

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[28] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[29] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Eighth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
The Recommended Order of a Trial Examiner of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby notify our employees that:

WE WILL NOT unlawfully question employees as to their own or fellow employees' union sympathies and leanings, threaten economic reprisals because of union activities, condition job advancement upon abandonment or renunciation of union activity, create the impression that employees' union activities are under surveillance, or in any other manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

WE WILL rescind our no-solicitation no-distribution rule posted on July 22, 1965, as it applies to union solicitation or other activities protected by Section 7 of the Act.

WE WILL, upon request, bargain collectively with TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS LOCAL #20, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of all our employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees at our Gibsonburg, Ohio, plant, including shipping, receiving, stockroom and tool room employees, truckdrivers, draftsman, and working group leaders, but excluding office clerical employees, time study methods employee, and all guards, professional employees and supervisors as defined in the Act.

ATLAS ENGINE WORKS, INC.
(Employer)

Dated _____. By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 720 Bulkley, 1501 Euclid Avenue, Cleveland, Ohio 44115 (Te. No. 621-4465).

APPENDIX E.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES.

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS.

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may

be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

UPREME COURT U. S.

JAN 6 1969

JOHN F. DAVIS CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ——
906

THRIFT DRUG COMPANY OF PENNSYLVANIA,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT LEWIS
Counsel for Petitioner
11 West 42nd Street
New York, N. Y. 10036

Of Counsel:

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
New York, New York

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

THRIFT DRUG COMPANY OF PENNSYLVANIA,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Thrift Drug Company of Pennsylvania, Petitioner herein, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 11, 1968, granting enforcement of an order issued against Petitioner by the National Labor Relations Board.

On December 16, 1968, this Court granted certiorari in Case Nos. 573, 585 and 691.[1] The pivotal issue in these cases is the reliability of union authorization cards. The same issue is present in the instant matter. In addition, this case presents important closely related subsidiary issues. It therefore provides an appropriate vehicle for a thorough consideration by this Court of the law pertaining

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[1] *NLRB* v. *Gissel Packing Co., Inc.* (Case No. 573); *The Sinclair Co.* v. *NLRB* (Case No. 585); and *Local No. 347, Food Store Employees Union* v. *NLRB* (Case No. 691).

to the use of authorization cards as a basis for certifying unions.[2]

Opinions Below

The opinion of the Court of Appeals has not yet been officially reported. It is annexed as Appendix A, pp. 1a-6a. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 167 NLRB No. 57 (Appendix B, pp. 7a-49a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(e).

Questions Presented

1. Where an employer refuses a union's offer to prove that a majority of employees signed authorization cards on the ground that in its experience a card check is unreliable because it would not reveal whether employees had signed cards as a result of misrepresentation as to the purpose of the card, and the employees subsequently reject union representation in an election, is the National Labor Relations Board nevertheless lawfully entitled to certify the union based upon such cards?

2. Should authorization cards be counted in determining a union's majority, and as a basis for a bargaining order, where the solicitor told one employee that the card was an 'election card', and stated to four additional employees that they were under no obligation by signing the cards?

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[2] Should this Court grant certiorari herein, Petitioner will file its Brief within a shorter period of time than provided in this Court's Rules, in order to facilitate the review of this case at the same time as this Court reviews Case Nos. 573, 585 and 691.

3. Should authorization cards be admitted in evidence in the absence of testimony from the signer or a witness to their execution?

4. May an employer's good faith doubt of a union's majority status at the time the union demands recognition be negated solely on the basis of unfair labor practices committed subsequent to the demand?

5. Does it effectuate the policies of the Act to issue a bargaining order in every case where an employer unlawfully refuses to recognize a majority union?

Statutes Involved

The National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 945; 73 Stat. 544; 29 U.S.C. § 141 *et seq.*), insofar as is here pertinent, provides:

Section 7:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a):

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .

• • •

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 9(c):

"(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 10(b):

"* * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States. . . ."

Section 10(e):

"* * * The finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

Statement of the Case

Thrift Drug Company of Pennsylvania, hereinafter referred to as the "Petitioner", is a Pennsylvania corporation having its principal office in Pittsburgh, Pennsylvania.

In May, 1966, the Retail Clerk's Union, Local 526, Retail Clerks' International Association, hereinafter referred to as the "Union," began organizing the employees of Petitioner's store in Kenosha, Wisconsin.

The Union's organizer testified that he advised one employee whose signature he solicited that she would be signing "an election card" which "would not obligate her in any way." When asked what he explained to this employee, he responded "only the election is as far as I went."

The organizer also testified that in obtaining cards from four additional employees he advised them that they would not be under any obligation by signing the cards.

After approximately four months of such solicitation, the Union signed up ten (10) of the sixteen (16) employees in the unit.

On August 24, 1966, by mail, the Union requested recognition as the bargaining representative for all of the employees.

Petitioner, through its counsel, responded to the Union by letter on August 29, stating in part:

> "Furthermore, your offer of a card check is not a suitable way to attempt to resolve the company's doubt of your claim of majority status. A mechanical check of alleged signatures would in no way indicate whether an employee had signed a card under coercion or because of misrepresentation as to the purpose of the card. Our office knows, and you do, too, of many situ-

ations where cards signed under the above circumstances have been held to be invalid. A mechanical card check would not reveal such shortcomings. We are in agreement with you that the questions raised by your letters and petition can best be resolved under the auspices of the National Labor Relations Board in a secret ballot election among the employees of the company."

On August 30, Petitioner received a notice of representation hearing from the Board. On September 19, the parties entered into a Stipulation for Certification Upon Consent Election which was approved by the Regional Director of the Board. On September 21, the Union filed unfair labor practice charges, alleging that Petitioner had violated Section 8(a)(1) of the Act. On October 12, the election was held. Out of fifteen (15) eligible votes cast in the election, seven (7) votes were for the Union, and eight (8) were against representation.

On October 18, the Union filed objections to conduct affecting the results of the election and an amended charge. A complaint was issued by the Board on November 15. The case was heard on December 12 and 13, 1966, in Kenosha, Wisconsin.

Decision of the Trial Examiner

The decision of the Trial Examiner, rendered on May 30, 1967, found that Petitioner had committed various acts of interference and restraint in violation of Section 8(a)(1) of the Act. He further found that the Union represented a majority of the employees based upon authorization cards and that the Petitioner's refusal to recognize the Union was in violation of Section 8(a)(5) of the Act. He

therefore recommended that the election be set aside, the representation petition be dismissed, and that Petitioner commence bargaining with the Union.

Decision of the Board

On September 15, 1967, the Board issued its Decision and Order affirming and adopting the findings, conclusions and recommendations of the Trial Examiner. Petitioner filed a petition for review with the Court of Appeals for the Sixth Circuit on October 2, 1967.

Decision of the Court of Appeals

On December 11, 1968, the Court of Appeals rendered its decision enforcing in full the Board's Order.

Reason for Granting Review

This Court has already granted certiorari to resolve a conflict between the circuits concerning the reliability of authorization cards in determining a union's majority status. If certiorari is granted herein, this Court can resolve additional conflicts concerning other aspects of the same question.

POINT I

This Court Is Presently Reviewing the Identical Issue Involved in This Case.

The issue in *NLRB* v. *Sinclair Co.*, 397 F. 2d 157 (1st Cir. 1967), *cert. granted* December 16, 1968, is identical to the primary issue in the instant matter. In *Sinclair*, the Court of Appeals for the First Circuit relied upon authorization cards as a basis for enforcing a bargaining order. The *Sinclair* decision is in conflict with the holding of the Fourth Circuit in *NLRB* v. *Gissel Packing Co.*, 398 F. 2d 336 (4th Cir. 1968), *cert. granted* December 16, 1968. In *Gissel*, the Court stated:

> "In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election." 398 F. 2d at 337.

The decision of the Court of Appeals for the Sixth Circuit in the instant matter is similarly in conflict with the *Gissel* decision and the decision on which it was based, *NLRB* v. *S.S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir.

1967). This conflict between the circuits was succinctly stated by the court below:

> "Appellant cites and relied on the Fourth Circuit view of NLRB bargaining orders expressed in *NLRB* v. *S.S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967). This court has, however, considered and rejected the *Logan* holding. *NLRB* v. *Atco-Surgical Supports, Inc.*, 394 F. 2d 659 (6th Cir. 1968)." (Appendix A, p. 6a).

It therefore would be appropriate to consider this matter along with the *Gissel* and *Sinclair* cases.[3]

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[3] In *Gissel* and *Sinclair* the most significant issue presented is whether the NLRB may certify a union based upon authorization cards. The resolution of this issue will depend in large part on an interpretation of the Act and its legislative history. In *Gissel*, counsel for the Union has indicated in its Petition for a Writ of Certiorari that legislative history supports an interpretation of the Act that the Board may use authorization cards as a basis for bargaining orders. There is no indication that any other party will present a contrary interpretation.

In its Brief to the Court of Appeals for the Sixth Circuit, Petitioner argued that the Board is restricted to the use of secret ballots for the resolution of representation questions. Petitioner cited legislative history and misinterpretation of this Court's decision in *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944), in support of its argument. Petitioner submits that this discussion would be beneficial to this Court in resolving the conflict between the circuits concerning the reliability of authorization cards. ***The pertinent part of its Brief is attached hereto as Appendix C, pp. 50a-64a.***

POINT II

Assuming That This Court Holds That Authorization Cards May Be Used as a Basis for Certifying a Union, Certiorari Should Be Granted in Order to Resolve a Sharp Conflict Within the Circuits With Respect to the Rule to Be Followed Where There Is Evidence of Misrepresentation as to the Purpose of the Cards.

A. *By Adhering To Its Cumberland Shoe Rule The Court Below Refused To Invalidate Authorization Cards Obtained Through Misrepresentation.*

The most significant issue to be decided by this Court in *Sinclair* and *Gissel* is whether the National Labor Relations Board may certify a union based upon authorization cards. Inextricably related to this question is another, equally troublesome: Does a misrepresentation by the solicitor as to the card's purpose invalidate the card?

The National Labor Relations Board has advised this Court that unions have in fact engaged in such misrepresentation. In its Petition for a Writ of Certiorari in *Gissel*, the Board states:

> "Although there have been abuses in the unions' use of authorization cards—primarily misrepresentations as to whether by signing the cards the employees were designating the union as their representative or merely authorizing it to seek an election to determine that issue—it does not follow that such cards are inherently unreliable." (p. 19).

Counsel for Petitioner agrees with the Board that there have been abuses in the use of authorization cards and have explicated their views in legal periodicals.[4]

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[4] See Robert Lewis, "The Use and Abuse of Authorization Cards in Determining Union Majority," 16 Lab. L.J. 434 (July, 1965);

Inasmuch as this question is not presently before the Court,[5] we submit that this case presents a most appropriate vehicle to resolve the conflict between the circuits, as discussed below. It presents the issue squarely.

The Union representative unequivocally testified that he advised the employee whose signature he solicited that she would be signing "an election card" which "would not obligate her in any way." When asked what he explained to this employee, he responded "only the election is as far as I went." (App. 73a, Record in Court of Appeals). The Board counted this card, and others similarly obtained, towards determining the Union's majority. The court below affirmed, in reliance on its *"Cumberland* rule."[6] (Appendix A, pp. 3a-4a).

The Sixth Circuit's *Cumberland* rule holds that union authorization cards will be invalidated on the grounds of misrepresentation in only one situation: where the solicitor's words "create in the mind of the one solicited a belief that the *only purpose of the card is to obtain an election." NLRB* v. *Swan Super Cleaners, Inc.,* 384 F. 2d 609, 618 (6th Cir. 1967) (emphasis in original).

Accordingly, since the solicitor in the instant matter did not represent that an election was the "only purpose" of the card, the court below, relying on its *"Cumberland* rule",

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Robert Lewis, "NLRB Again Stretches Joy Silk's Tenuous Fabric," 18 Lab. L.J. 222 (April, 1967); and William Krupman, "The Joy Silk Rule—The Courts Weave A New Fabric," 19 Lab. L.J. 603 (October, 1968).

[5] In its Petition for a Writ of Certiorari in *Gissel,* the Board states:

> "The standard by which the Board determines the validity of challenged cards . . . is not at issue in the present cases." (at pp. 20-21, n. 20).

[6] *NLRB* v. *Cumberland Shoe Corp.,* 351 F. 2d 917 (6th Cir. 1965).

upheld the Board's finding that the Union represented a majority of the employees.

A different result would have been reached in the circuits which do not follow *Cumberland.*

B. *The Decision Below Conflicts With Decisions In The 2nd, 4th, 5th, 7th and 8th Circuits Regarding The Rule To Be Followed Where Cards Have Been Obtained Through Misrepresentation.*

The Sixth Circuit's Cumberland rule has been rejected by five other circuits.

The *Second Circuit's* rejection of the rule of the Sixth Circuit was expressed in *Bryant Chucking Grinder Company* v. *NLRB,* 389 F. 2d 565 (2nd Cir. 1967), *cert. denied* 392 U.S. 908. Referring to an earlier decision,[7] Judge Friendly, in his concurring opinion, stated:

> "*. . . we rejected the rule announced by the Board in Cumberland Shoe Corp.,* 144 N.L.R.B. 1268 (1963), enforced 351 F. 2d 917 (6th Cir. 1965), that an authorization card 'clear' on its face could be invalidated for misrepresentation as to its purpose only by proof that the solicitor had said that the 'sole' purpose of the card was to secure an NLRB conducted election; we held that cards were invalid if 'signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election.'" 389 F. 2d at 569 (emphasis added).

The *Fourth Circuit* repudiated the *Cumberland Shoe* rule in *Crawford Mfg. Co.* v. *NLRB,* 386 F. 2d 367 (4th Cir. 1967), *cert. denied* 390 U.S. 1028:

> "Despite the regard we hold for the contrary opinion, e.g., NLRB v. Cumberland Shoe Corp., 351 F. 2d 917,

[7] *NLRB* v. *S. E. Nichols Co.,* 380 F. 2d 438 (2nd Cir. 1967).

920 (6th Cir. 1965) and cases there cited, we will not stick mechanically to the literal phrasing of the cards. A ghost of the parol evidence rule, such literalism subordinates what really counts: the actual understanding of the signers." 386 F. 2d at 372.

The *Fifth Circuit* rejected *Cumberland Shoe* in *Engineers & Fabricators, Inc.* v. *NLRB*, 376 F. 2d 482 (5th Cir. 1967):

"The Trial Examiner and the Board rely on Cumberland Shoe Corp., 144 N.L.R.B. 1268 and Aero Corp., 149 N.L.R.B. 1283 (1965) for the rule that if such cards as these are solicited by a statement that they are to be used to get an election, but are later used to prove majority status, there is no misrepresentation. According to the Board, it would require a statement that the cards were to be used *only* to get an election to constitute misrepresentation.

This Court has previously shown its impatience with such contentions." 376 F. 2d at 486 (emphasis in original).

The *Seventh Circuit* in *NLRB* v. *Dan Howard Mfg. Co.*, 390 F. 2d 304 (7th Cir. 1968), and the *Eighth Circuit* in *Bauer Welding and Metal Fabricators, Inc.* v. *NLRB*, 358 F. 2d 766 (8th Cir. 1966), have refused to follow the Board's rule as enforced by the Sixth Circuit.[8]

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[8] The First Circuit has apparently lined up with the 2nd, 4th, 5th, 7th and 8th Circuits in disapproving the *Cumberland Shoe* rule. In *NLRB* v. *Sandy's Stores, Inc.*, 398 F. 2d 268, 271 (1st Cir. 1968), the court stated:

"Moreover, affirmation of the card authorization findings would require reliance in the most mechanical sense on the *Cumberland* rule, an approach rejected by a number of other circuits and, we think, not necessarily commanded in the instant case by our own remarks in NLRB v. Southbridge Sheet Metal Works, Inc., 380 F. 2d 851 (1st Cir. 1967)."

C. *The Decision Below Is Consistent With The Rule Of The District Of Columbia And The Tenth Circuits.*

The United States Court of Appeals for the District of Columbia in *U.A.W.* v. *NLRB (Preston Products)*, 392 F. 2d 801 (D.C. Cir. 1967), *cert. denied* October, 1968 (Case No. 160), held:

> "This court has consistently upheld the rule, announced by the Board in N.L.R.B. v. Cumberland Shoe Corp., 144 NLRB 1268 (1963), *enforced*, 6 Cir., 351 F. 2d 917 (1965), that where the cards are unambiguous on their face, unless employees were told that an election was the *only* purpose of the cards, the employees would be held to the terms of the cards which they had signed." 392 F. 2d at 807 (emphasis in original).

Accord: Furr's Inc. v. *NLRB*, 381 F. 2d 562 (10th Cir. 1967).

D. *Uniformity Of Interpretation Of National Labor Policy Is Desirable.*

The Sixth and Tenth Circuits, and the District of Columbia Circuit, have one rule concerning misrepresentation. The Second, Fourth, Fifth, Seventh, Eighth and, apparently the First Circuits, have another rule. The resolution of this continuing and ever-increasing conflict would be beneficial. The continued existence of different rules on this important issue in labor-management relations impairs the uniformity of national labor policy that the Act was designed to achieve.[9] *Cf.*, *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 490-91.

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[9] Resolution of this conflict between the circuits would also lessen the likelihood of "undersirable 'circuit shopping'." *Automobile Workers* v. *Scofield*, 382 U.S. 205, 212-13 and 222, n. 20.

POINT III

The Decision of the Court Below Is in Conflict With Decisions of the 7th and 8th Circuits With Respect to the Applicable Rules of Evidence and Procedure to Be Followed in Determining the Authenticity of Authorization Cards.

The Petitioner argued before the court below that two of the Union's ten authorization cards should not be counted in determining the Union's majority. Petitioner submitted that the two cards were not properly authenticated because:

(1) The card signers did not testify, and
(2) The person who authenticated the cards was not a witness to the signing.

The Trial Examiner, upheld by the Board, found:

"I merely restate the obvious, for emphasis, by pointing out that Crowe did not testify that the cards were signed in her presence, or that they had come into her possession in connection with her duties as a steward for the Union.

* * *

Of course, it was unnecessary for the Respondent to put forth any effort to help the General Counsel prove his case, and the question as to whether I was right in receiving General Counsel's Exhibits 9 and 10 is whether the General Counsel's submission, through Crowe's testimony, established a *prima facie* case." (Appendix B, pp. 21a-22a).

* * *

"On the basis of the thin and barely adequate identification by Crowe that she recognized the signatures

> on General Counsel's Exhibits 9 and 10 as being those of Hix and McClelland, I affirm my ruling admitting those exhibits in evidence, and find that the purported signatures are genuine, and the authorization cards valid." (Appendix B, p. 26a).

General Counsel's method of authentication was to call upon a complete stranger to verify the signatures. The Trial Examiner and the Board approved this procedure. The court below did not specifically pass on this issue.[10] However, by refusing to invalidate the cards, it impliedly affirmed the method used to authenticate them. Thus, the Sixth Circuit placed itself in conflict with the decisions of the Seventh and Eighth Circuits.

The rule of the Seventh and Eighth Circuits is that authorization cards must be signed in the presence of the witness who seeks to authenticate them.

In *NLRB* v. *Economy Food Center,* 333 F. 2d 468 (7th Cir. 1964), the court stated:

> "The signatures on the cards of the two employees absent at the time of the hearing were authenticated by Union representative Goss, who testified that both cards were signed in his presence and that he witnessed each signature." 333 F. 2d at 471.

The Eighth Circuit similarly held in *Colson Corp.* v. *NLRB,* 347 F. 2d 128 (8th Cir. 1965), *cert. denied* 382 U.S. 904, that for the purpose of authenticating authori-

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[10] The court below did not resolve this issue because in its opinion "the two cards would not eliminate the union's majority status." Appendix A, pp. 3a-4a, n. 3. However, these two cards would be determinative of the union's majority status if even one additional card was obtained through misrepresentation. (See Point II, *supra*).

zation cards the witness must have been present when the card was signed:

> "Petitioner argues that each employee who signed a card should have personally authenticated his own signature. The law permits alternative methods of authentication. *Thus the courts have approved the authentication of such cards by a witness to their execution,* N.L.R.B. v. Economy Food Center, 7 Cir. 1964, 333 F. 2d 468, 471, or by comparison with a known specimen of the person's handwriting, N.L.R.B. v. Philamon Laboratories, 2 Cir. 1962, 298 F. 2d 176, 179-180, certiorari denied, 370 U.S. 919, 82 S. Ct. 1555, 8 L. Ed. 2d 498." 347 F. 2d at 134 (emphasis added).

The manner by which authorization cards are authenticated will often be determinative of the card's reliability. The proper method of authentication should therefore be resolved by this Court.[11]

POINT IV

Certiorari Should Be Granted to Resolve a Conflict in the Circuits as to Whether an Employer's Good Faith Doubt of a Union's Majority Can Be Negated by Subsequent Unfair Labor Practices.

The Trial Examiner and the Board resolved the question of whether the Petitioner had a good faith doubt of the Union's majority solely on the basis of unfair labor practices committed subsequent to the Union's demand for

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[11] This Court may desire to pass upon the applicability of Section 10(b) to the proper method of authentication. As noted by the court below, (Appendix A, pp. 3a-4a, n. 3), varied interpretations have been placed on this section in different circuits. Cf. *NLRB* v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758 (6th Cir. 1964).

recognition. Referring to the Petitioner's reasons for rejecting the Union's demand for recognition, the Trial Examiner stated:

> "The assertions might, in other circumstances, have established a good faith doubt, but here their force has been effectively blunted by its aggravated conduct in coercing and intimidating its employees. . . ." (Appendix B, pp. 37a-38a).

The court below held that:

> "The Trial Examiner and the Board had ample reason to conclude that Petitioner's course of conduct represented rejection of collective bargaining rather than a good faith doubt of the Union's majority status." (Appendix A, p. 6a).

This holding is in conflict with the decisions of the Second Circuit. The Second Circuit does not rely on evidence of a company's "course of conduct" subsequent to a request for recognition to determine whether the company acted in bad faith at the time it refused recognition.

In *NLRB* v. *River Togs, Inc.*, 382 F. 2d 198 (2nd Cir. 1967), the court stated:

> ". . . we see no logical basis for the view that substantial evidence of good faith doubt is negated solely by an employer's desire to thwart unionization whether by proper or even by improper means." 382 F. 2d at 206-07.

In *Textile Workers Union* v. *NLRB*, 386 F. 2d 790 (2nd Cir. 1967), the court reaffirmed this doctrine:

> "The use of (a) campaign speech as evidence to infer bad faith at an earlier time is a hazardous business

as we pointed out in NLRB v. River Togs, Inc., supra, 382 F. 2d at 206-207; since votes may be gained or lost during a campaign, presenting anti-union arguments affords no logical basis for belief that the employer did not doubt the card majority." 386 F. 2d at 794.

If certiorari were granted herein, this conflict between the Sixth and the Second Circuits could be resolved.

POINT V

Certiorari Should Be Granted to Determine Whether the Policies of the Act Are Effectuated by the Issuance of a Bargaining Order in Every Case in Which an Employer Unlawfully Refuses to Recognize a Majority Union.

Almost immediately after the election seven of the ten employees who signed authorization cards voluntarily terminated their employment. (Appendix B, p. 38a). Petitioner argued before the Board and the court below that a bargaining order therefore was not justified because it was an inappropriate remedy under the facts of this case. (Appendix A, p. 3a).

The Board automatically adopted the Trial Examiner's recommended order that Petitioner bargain with the Union. The court below enforced the Board's order. It did not consider whether the facts of this case warranted a different conclusion. (Appendix A, p. 62).

The Second Circuit would have made such an inquiry. In *NLRB v. World Carpets of New York, Inc.*, —— F. 2d ——, 69 LRRM 2681 (2nd Cir. November 8, 1968) the court stated:

"On the other hand, if, on the remand we are directing, the Board should find the facts in a sense favorable to the General Counsel, it should not proceed immediately to the issuance of a bargaining order but should consider whether such an order in this case will further the policies of the National Labor Relations Act, notably 'to provide orderly and peaceful procedures for preventing the interference' by employees and employers 'with the legitimate rights of the other.' § 1(b). Cf. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193-97, 8 LRRM 439 (1941). As said in NLRB v. Flomatic Corp., 347 F.2d 74, 78, 59 LRRM 2535 (2 Cir. 1965), a bargaining order is 'strong medicine' whose 'potentially adverse effects on the employees' § 7 rights must not be overlooked.' While, despite the contrary ruling of another circuit, NLRB v. S .S. Logan Packing Co., 386 F.2d 562, 66 LRRM 2596 (4 Cir. 1967), we continue to hold that a union validly authorized by a majority of the employees in an appropriate unit is generally entitled to recognition without having to submit to a Board-supervised election, the Board should not automatically issue a bargaining order in every such case without considering whether the policies of the Act will be effectuated thereby. 'The Act does not create rights for individuals,' or for unions, 'which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace.' Phelps Dodge Corp. v. NLRB, *supra*, 313 U.S. at 194, 8 LRRM 439." 69 LRRM at 2684.

To the same effect, *NLRB* v. *Pembeck Oil Corp.*, —— F.2d ——, 69 LRRM 2811 (2nd Cir. November 27, 1968).

If certiorari were granted herein, this Court could determine whether the policies of the Act effectuate the issuance of a bargaining order in every case.

CONCLUSION

It is respectfully requested that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit and thereby resolve significant conflicts in the circuits concerning the broad and frequently litigated subject of authorization cards.

Respectfully submitted,

.....

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New York, New York

Dated: December 31, 1968.

APPENDIX

APPENDIX A

Opinion of the Court of Appeals for the Sixth Circuit

FILED
DEC 11 1968
CARL W. REUSS, Clerk

No. 18216

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION for Review of an Order of the National Labor Relations Board.

THRIFT DRUG COMPANY OF PENNSYLVANIA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Decided December 11, 1968.

Before: O'SULLIVAN, EDWARDS and MCCREE, Circuit Judges.

EDWARDS, Circuit Judge. Petitioner in this case seeks to set aside the findings and the bargaining order entered by the National Labor Relations Board, and the Board in turn seeks enforcement of its order. The conclusions of law, as set forth in the Trial Examiner's decision and as adopted by the Board, are as follows:

"1. All employees at Respondent's Kenosha, Wisconsin, store, excluding the store manager, assistant store manager, lunch counter manager, professional employees, guards, and supervisors as defined in the Act,[1] constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

"2. At all times since August 24, 1966, the Union[2] has been the duly designated bargaining representative of the aforesaid collective-bargaining unit.

"3. The Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1), by threatening them that the Kenosha store or its fountain department would be closed down or that they would lose their store or food discounts, by promising them wage increases and other benefits, by coercively interrogating them as to how they were going to vote, or if they had attended union meetings, by intimidating them through its orders to reject applications for employment from prounion applicants, and by telling them that their attendance at union meetings had been observed and noted.

"4. By failing and refusing on August 26, 1966, and at all times thereafter, to recognize and bargain with the Union as the collective-bargaining representative of the employees in the aforesaid unit, and by unilaterally changing the wages of employees in October 1966, without notice to or consultation with the Union, the

[1] National Labor Relations Act, 29 U.S.C. §§ 151-168 (1964).

[2] Retail Clerks International Association, Local 526, AFL-CIO.

Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act.

"5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act."

Petitioner does not contest the section 8(a)(1) violation findings in this proceeding. It also concedes the fifth of the conclusions above, reserving most of its argument for three contentions:

1. The bargaining order was not justified because in fact the union never had a valid card majority.

2. The bargaining order was not justified because petitioner had a good faith doubt of the union's majority.

3. The bargaining order was not justified because under the facts of this case it was an inappropriate remedy.

The Board found that the union had ten authorization cards out of an appropriate bargaining unit of fifteen when it made its demand for bargaining rights on August 24, 1966. Petitioner's primary argument attacking this majority is that a number of cards should be held to be invalid because of solicitor misrepresentations.[3] In this re-

[3] Two of these cards are also challenged by petitioner on the ground that the witness who testified she "recognized" the signatures had not been properly qualified to so testify. The statute under which NLRB hearings are authorized provides in part: "Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure. . . ." 29 U.S.C. § 160(b) (1964). Some courts looking at the "so far as practicable" language have held that "the Board is not required to observe the legal rules of evidence as are com-

gard petitioner relies upon this court's holding in *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967):

> "We think it right now to say that we do not consider that we have announced a rule that only where the solicitor of a card actually employs the specified words 'this card is for the *sole* and *only* purpose of having an election' will a card be invalidated. We did not intend such a narrow and mechanical rule. We believe that whatever the style or actual words of the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the card is to obtain an election,* an invalidation of such card does not offend our *Cumberland* rule [*NLRB v. Cumberland Shoe Corp.*, 351 F.2d 917 (6th Cir. 1965)]." *Id.* at 618. (Emphasis in original.)

In our instant case there is no claim that the cards themselves contained any ambiguity or misrepresentation. We have examined the claimed misrepresentations of the solicitors. Taking into account our court's limited function in review of NLRB findings of fact and inferences based thereon, we do not find any language which compelled the Board to hold that a particular solicitor was seeking to convey "a belief that the *only purpose of the card is to obtain an election.*"

We now turn to appellant's second and third substantial contentions pertaining to "good faith doubt" and "inap-

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mon law courts." *NLRB v. W. J. Jones Lumber Co.*, 245 F.2d 388 (9th Cir. 1957). *See also Sardis Luggage Co. v. NLRB*, 234 F.2d 190 (5th Cir. 1956). However, in view of the fact that the two cards would not eliminate the union's majority status, we do not find it necessary to pass on petitioner's contention that the Trial Examiner's receipt of them in evidence was error.

propriate remedy." These we believe to be closely related and hence they will be considered together.

This record shows that close on the heels of the union's August 24, 1966, bargaining demand (and even before its refusal by petitioner), one of the petitioner's employees heard the store manager say: "I don't know what's the matter with these girls. They won't believe me when I tell them they're going to close the store, if the union gets in, and we'll all be out of a job." This same witness also testified to another conversation with this same store manager shortly before the NLRB election:

> "Well, he asked me did I hear — he said, 'You know, the election is October 12th.' And I said, yes, I did. And he said, 'Well, maybe you'd like to come in and work for a couple of hours on the 12th,' because that was my day off. And he said, 'You have to be in the store to vote.' And I said, 'Well, don't worry, I'll come in to vote.' And he said, 'Well, I thought you might like to get some time in before the 12th, because if the union gets in you're not going to get any time in after the 13th.' "

The record is replete with similar testimony from other witnesses. It also contains support for the Trial Examiner's finding of promises of wage increases. One witness testified that midway in the election campaign the store manager told three employees: "I'm planning to give you a raise in October, or see you get a raise in October, if the union doesn't come in, and I'm thinking of a dollar and a half."

All in all, the course of conduct shown on the part of petitioner immediately after receipt of the union's demand

for bargaining rights was that of an employer determined to defeat unionization regardless of the wishes of the employees and completely without regard to the law. The violation of the NLRA found in this case can by no means be characterized as "borderline" section 8(a)(1) violations as in *NLRB* v. *Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968), or as 8(a)(1) violations "without more" as in *Lane Drug Co.* v. *NLRB*, 391 F.2d 812 (6th Cir. 1968). Indeed, it seems remarkable on this record that the union lost the election by the close vote of seven votes for the union to eight against. The Trial Examiner and the Board had ample reason to conclude that petitioner's course of conduct represented rejection of collective bargaining rather than a good faith doubt of the union's majority status.

Under the factual circumstances of this case, we believe that the findings and conclusions of the Board have substantial support in this whole record. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

Enforcement of the bargaining order may well be the only way to remedy the illegal course of conduct deliberately chosen by petitioner. *NLRB* v. *Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir.), *cert. denied*, 382 U.S. 830 (1965); *NLRB* v. *Cumberland Shoe Corp.*, 351 F.2d 917 (6th Cir. 1965); *NLRB* v. *Delight Bakery, Inc.*, 353 F.2d 344 (6th Cir. 1965).

Appellant cites and relies on the Fourth Circuit view on NLRB bargaining orders expressed in *NLRB* v. *S. S. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967). This court has, however, considered and rejected the *Logan* holding. *NLRB* v. *Atco-Surgical Supports, Inc.*, 394 F.2d 659 (6th Cir. 1968).

Enforcement of the Board's order is granted.

APPENDIX B

Decisions and Orders of the National Labor Relations Board and Trial Examiner

DECISION OF THE NATIONAL LABOR RELATIONS BOARD

On May 24, 1967, Trial Examiner Milton Janus issued his Decision in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. The Trial Examiner further recommended that the election held in Case No. 30-RC-508 be set aside and the petition filed therein be dismissed. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs; the Respondent filed an answering brief to the exceptions of the Charging Party, and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are herby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Decisions and Orders of the National Labor Relations Board and Trial Examiner

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Thrift Drug Company of Pennsylvania, Kenosha, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[1]

Dated, Washington, D.C. September 15, 1967.

.....

Frank W. McCulloch, Chairman

.....

John H. Fanning, Member

.....

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1] Delete from paragraph 2(b) of the Trial Examiner's Recommended Order that part thereof which reads "to be furnished" and substitute therefor "on forms provided. . . ."

Decisions and Orders of the National Labor Relations Board and Trial Examiner

TRIAL EXAMINER'S DECISION

Statement of the Case

MILTON JANUS, Trial Examiner: These cases, involving unfair labor practice charges and objections to conduct affecting the results of an election, were heard at Kenosha, Wisconsin, on December 12 and 13, 1966, pursuant to a complaint issued on November 15, 1966, and upon a report on objections issued the same date. The two cases were consolidated for hearing. The complaint, against Thrift Drug Company of Pennsylvania, herein called the Respondent or the Company, alleges violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. Briefs were filed after the close of the hearing by the Respondent and the Charging Union.

Upon the entire record and my observation of the witnesses, I make the following:

—2—

Findings of Fact

I. The Business of the Respondent

The Respondent is a Pennsylvania corporation, engaged in operating retail drug stores in several states. The store involved in these proceedings is located in Kenosha, Wisconsin. During the past calendar year, a representative period, Respondent's sales through all its retail stores, exceeded $500,000. During the same period, it purchased goods and material from points outside the State of Wisconsin in an amount in excess of $50,000, which were shipped, in interstate commerce, to the Kenosha store. I find that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

Decisions and Orders of the National Labor Relations Board and Trial Examiner

II. The Labor Organization Involved

Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Sequence of Events*[1]

The Union's campaign to organize the employees at Respondent's drug store at Kenosha, Wisconsin, began in May 1966 when it obtained three authorization cards and continued into, or was resumed, in August when it obtained another seven cards. With a total of 10 cards in its possession, the Union mailed three separate communications on August 24 to the Respondent's president at the home office in Pittsburgh, Pennsylvania. They were (1) a recognition letter, in which it claimed that it represented a majority of the employees in the Kenosha store, requested a meeting at a specified time and place to discuss contract terms, and offered to prove its majority in an appropriate unit at that time by submitting its cards to an impartial third party for authentication of its claim; (2) a so-called Warning Notice in which the Union informed the Company that it was organizing its employees and already represented a "substantial number" of them, gave what it called official notice of its campaign and interest in a storewide unit, and cautioned the Company against intimidating its employees; and (3) a letter in which it enclosed a copy of a representation petition to the Board. The original petition was received by the Board the next day.

[1] All dates herein refer to the year 1966.

The three letters were received by the Company on Friday, August 26. The following Monday, August 29, the Respondent's attorney wrote the Union acknowledging receipt of the letters, stated that he considered the one requesting recognition and the one informing the Company of its organizational activity as "inconsistent and confusing," that the Company had advised him of its doubts

whether the Union represented an uncoerced and informed majority of its employees in an appropriate unit, and that it doubted the appropriateness of a single store unit. It also rejected the offer of a cardcheck because of the possibility of coercion or misrepresentation as to the purpose of the cards, and agreed to resolve the questions raised by the union letters "in a secret ballot election among the employees of the Company."

A stipulation for certification upon consent election was approved by the Regional Director on September 20, in which the appropriate unit was defined as all employees at the Kenosha store, excluding store manager, assistant store manager, lunch counter manager, professional employees, guards and supervisors as defined in the Act. A few days later, the Union filed its original charge in this case, alleging that the Company had committed violations of Section 8(a)(1). The next day, it requested the Board to proceed with the stipulated election, notwithstanding its charges. The election was held on October 12, and the employees rejected the Union by a vote of eight to seven. On October 18, the Union filed timely objections to conduct affecting the election, and on the same day it filed an amended charge alleging that the Company had unlawfully refused to bargain with it.

B. *The Issues*

The basic issue is whether the General Counsel has established that the Company's refusal to recognize and bargain with the Union was undertaken in bad faith, for the purpose of dissipating the Union's majority, or in rejection of the collective-bargaining principle. Resolution of that issue necessarily requires examination and determination of other questions; whether there was a proper request for recognition; the Union's majority status, which involves the composition of the appropriate unit and the validity of certain authorization cards; and whether the Company's total conduct was sufficiently grave to warrant setting aside the election and to direct a second election or order the Company to bargain despite the Union's loss of the first election.

C. *Adequacy of the Request for Recognition and Bargaining*

As noted above, on August 24, in separate letters the Union advised the Company that it represented a majority of the employees at the Kenosha store, that it was engaged in organizing and already represented a substantial number of the employees, and that it was filing a petition. The Company argues that the Union's demand for recognition was defective and invalid because its communications with the Company were inconsistent and confusing; it thereafter failed to clarify its position although invited to do so; and its offer to substantiate its majority showing by a card check was meaningless since the cards were no longer in its possession, having been submitted to the Regional Director as its showing of interest to accompany the petition.

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Standing alone, the Union's letter requesting recognition for all employees at the Kenosha store and offering to negotiate the terms of a bargaining contract upon proof of its majority through examination of cards (General Counsel's Exhibit 2) is unambiguous and unequivocal, and satisfies the Board's requirements in that regard. Nor does the filing of a representation petition simultaneously with a request for recognition and bargaining constitute a withdrawal or qualification of the Union's right to be recognized if, in fact, the Employer has no good-faith doubt of the Union's majority.[2]

The issue of the Company's asserted good-faith doubt will be discussed later, in connection with the violations of Section 8(a)(1) alleged in the complaint, and I limit myself for now to the Company's assertion that the separate communications of August 24 were, taken together, so inconsistent as to leave the Company in doubt as to how to proceed. Its confusion seems to be self-engendered and without any rational basis in fact. There was surely no real inconsistency between the claim in the recognition letter that it already represented a majority of the store employees, and the warning letter in which it called attention to its organizing campaign and claimed to represent a substantial number of employees. In effect, the Union was noting, perhaps superfluously but harmlessly, that it intended to continue its organizing drive in order to hold on to, and to expand, the answer of its adherents. Nor was the Union required to answer the attorney's letter of August 29 and thereby forego its claim to be the exclusive representative of the employees, simply because it had

[2] *Midwestern Manufacturing Company, Inc.*, 158 NLRB No. 144, and cases cited in footnote 3 thereof.

also filed a petition, and was willing to rely on an election as one of several appropriate means by which its majority status could be tested.

Finally, Respondent's claim that the Union could not establish its majority by means of cards because it no longer had them in its possession is without merit. If Respondent had offered to examine the cards, instead of rejecting that procedure in its letter of August 29, it would have been in a better position to complain if the Union was unable to produce the cards which it had turned over to the Regional Director. In any event, a bonafide offer on the Company's part to negotiate an agreement if a card check substantiated the Union's majority claim, would have enabled the Union to withdraw the petition and to reclaim its cards from the Regional Director.

D. *The Union's Majority Status*

The unit: The only variation between the unit stipulated as appropriate by the parties for purposes of the consent election, and that described in the demand letter and petition, is that the former specifically excluded professional employees while the latter did not. There were three pharmacists employed at the store at all times during the relevant period who, the parties agree, were professional employees within the meaning of Section 2(12) of the Act.

—5—

Two of these were the manager and the assistant manager of the store, who were therefore also excluded as supervisory employees. The third pharmacist, Divjak, was a regular part-time nonsupervisory employee.

The parties agreed on the names of 14 employees who were employed on August 26, when the demand letter was

received by Respondent. The Respondent also urges that Divjak, the nonsupervisory pharmacist, and Petersen, classified as a merchandiser, must also be included in the count of employees against which the Union's majority status must be measured.

I am satisfied that Petersen must be included. Although he may have had some additional responsibilities for a short time between May 1966, when he came to work and July, when a pharmacist was hired to act as store manager, his duties in August and up to the date of this leaving, around September 15, were clearly nonsupervisory. Although he was not actually present at the store during parts of these months because of an accident and service in an Armed Forces Reserve camp, he was paid for those periods of absence.

His duties as a merchandiser were to display sundries, such as toys, pet supplies, etc., in the selling areas of the store, to requisition merchandise from the Company's central warehouse, take inventory, help unload trucks and put orders away. His duties as to ordering, inventorying, and stocking were no different in kind from those performed by the women employees in the cosmetics, tobacco, or drug departments. The testimony of the Company's personnel director that Petersen exercised no supervisory functions was not rebutted. Furthermore, his replacement after he left about September 15, was included on the eligibility list for the October election. I find that Petersen was the 15th employee in the unit described by the Union's demand letter.

Divjak presents a more difficult problem, because it requires a statutory interpretation which, to my knowledge, has not heretofore been squarely decided. The question is whether the Board may issue a bargaining order encom-

passing a unit in which a professional employee is included, thereby depriving him of the right prescribed by the proviso to Section 9(b)(1), of voting on whether he wishes to be included in a unit with nonprofessional employees.[3] Pre-

—6—

liminarily, I call attention to the fact that my discussion and holding on this issue will be dictum, since I also hold later on in this Decision, that the Union had 10 valid authorization cards, sufficient to establish its majority whether the appropriate unit consists of 16 or 15 employees, that is, whether Divjak is to be included or excluded. However, 2 cards, those of Hix and McClelland, are included in that majority of 10, and if I am wrong in counting them, the resulting total of 8 is sufficient to prove majority only if Divjak is excluded, and the unit is confined to 15 employees.

---

[3] The relevant statutory provisions to which I will refer are set out here. The italics in all cases is, of course, mine, for emphasizing particularly pertinent language.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*

* * * * *

Sec. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* that the Board shall not (1) *decide that any unit is appropriate for such purposes* if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; . . .

The Respondent argues that the Union's demand letter of August 24, by claiming to represent *all* employees at the Kenosha store, excluding only supervisors, implicitly requested that Divjak be included in the unit as a regular part-time professional employee, and that it act as his representative. It is true, as Respondent points out, that Section 9(b)(1) does not prohibit the establishment of bargaining units composed of both professional and nonprofessional employees, but requires only that the former be given a self-determination election on whether they wish to be included in such a mixed unit.

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The Respondent also points out, that if it had voluntarily recognized the Union as the exclusive representative of the employees claimed to be the appropriate unit in the Union's demand letter, the Union would have become Divjak's bargaining agent, and if an agreement had been entered into, he would have been bound thereby, even though he had not been given a choice between exclusion or inclusion. The case cited by Respondent for this proposition, *Retail Clerks Union Local No. 324 (Vincent Drugs)*, 144 NLRB 1247, as well as the later *International Telephone & Telegraph Corporation (ITT Federal Laboratories)*, 159 NLRB No. 145, hold that the Board will not strike down a relationship, voluntarily and consensually agreed to by the parties, in which professional employees have been joined without their prior consent, in a mixed unit with nonprofessional employees.

There is, in each of those cases, language to the effect that the Board is precluded by Section 9(b)(1) from establishing such a mixed unit, without self-determination by the professional employees, *in a representation proceeding*, or from *certifying* such a unit, thereby giving rise to a pos-

sible inference that the Board may do otherwise in proceedings where a Board-directed election under Section 9(c) is not invoked. Such an inference is not warranted because the Act, in my opinion, precludes the Board from establishing a mixed unit of professional and nonprofessional employees, without self-determination for the former, as prescribed by Section 9(b)(1) either in a representation proceeding under Section 9(c), or in an unfair labor practice proceeding under Section 8(a)(5) or 8(a)(1).

A union may achieve the status of exclusive bargaining representative for an appropriate unit, under Section 9(a), without first winning a representation election under Section 9(c).[4] The Board recognizes and validates the status thus obtained under Section 9(a), by a proceeding pursuant to Section 8(a)(5), or under certain circumstances, pursuant to Section 8(a)(1). But whichever paragraph of Section 8(a) is invoked, the Board must find that the unit in which the Union has achieved majority status is appropriate, and it must follow the applicable mandates of Section 9(b). The Board' *validation* of a unit as appropriate under Section 9(a) and (b) is necessarily quite different from a Board holding that parties who have consensually agreed to bargain with respect to an inappropriate unit may be permitted (or required) to continue their past course of action. In the former situation, the Board must affirmatively find a particular unit to be appropriate in all regards; in the latter it simply allows the parties to resume their extended history of bargaining for an inappropriate unit, without condoning their action but without declaring their conduct to be void *ab initio*.

---

[4] *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72; *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 100-101.

I hold, therefore, that I am precluded from finding the unit sought by the Union in its recognition letter to be appropriate, because the Board may not, under Section 9(b)(1), include a professional employee in any unit if he

has not had the opportunity to decide whether he wishes to be joined with nonprofessional employees.[5]

The unit for which the Union requested recognition was not inherently inappropriate, as I have mentioned above, if the Company had voluntarily accorded recognition upon being satisfied that the Union had valid authorization cards from a majority of its employees. Since the Company refused to do so, the Regional Director approved a stipulation for a consent election for a unit from which professional employees were excluded. The basic character of the unit originally requested (all store employees excluding supervisors) was unchanged by the exclusion of a single nonsupervisory professional pharmacist, and the variation between the units defined in the original request and in the stipulation, is insubstantial.[6] I find, therefore, that the unit agreed to in the stipulation for certification upon consent election is a unit appropriate for the purposes of collective bargaining.

Authentication of signatures: Ten dated and signed authorization cards were offered and received in evidence.

---

[5] The distinction between a Board finding and a Board certification of an appropriate unit is explicitly drawn in Section 9(b)(3) with respect to the two separate standards for labor organizations which represent guards. See *The William J. Burns International Detective Agency, Inc.*, 134 NLRB 451, where the distinction between the two is discussed and specifically relied upon.

[6] *Heck's Inc.*, 156 NLRB 760, 765-767; *Ottenheimer and Company, Inc.*, 144 NLRB 38, 46; *Galloway Manufacturing Corporation*, 136 NLRB 405, 408; and *The Hamilton Plastic Molding Company*, 135 NLRB 371, 373.

Four employees (Alberta Story, Lana Pfeiffer, Jacquelyn Zellen, and Sophie Zebrowski) personally identified their own signatures, and no question is raised as to the authenticity of those cards.

Paul Whiteside, Jr., a representative of Retail Clerks International Association, District Council No. 14, testified that he had witnessed the signing of four additional cards. They are those of Evelyn Massie, Louis Vena, Lois Wasiulewski, and Teresa Witt. In its brief, the Respondent urged that the four cards which Whiteside said had been signed in his presence, but which were not personally authenticated by their signers should not be counted towards the Union's majority, because the General Counsel failed to call the four signers to identify their signatures or to establish that they were unavailable to testify. The contention has been uniformly held to be without merit. A card may be properly authenticated by a witness who testifies that he observed its signing.[7] Since Whiteside's testimony was com-

petent and probative, it is immaterial that the General Counsel may have relied on other methods of proving the authenticity of the cards.

The last of the 10 cards are those purporting to be signed by Hazel Hix and Nancy McClelland (General Counsel's Exhibits 9 and 10). The General Counsel called Beverly Crowe as his witness to vouch for the genuineness of Hix's and McClelland's signatures on these two cards. Crowe is not employed by the Respondent, and at her place of em-

[7] *Don the Beachcomber,* 163 NLRB No. 36, footnote 2; *Lifetime Door Company,* 158 NLRB No. 3; *Colson Corporation* v. *N.L.R.B.,* 347 F.2d 128, 134 (C.A. 7); *N.L.R.B.* v. *Economy Food Center, Inc.,* 333 F.2d 468, 471 (C.A. 7).

ployment she serves as a steward for the Charging Union. After preliminary questions as to her name and employment, Crowe testified as follows, in response to the questions of Mr. Selby, counsel for the General Counsel.

> Q. I hand you what has been marked General Counsel's Exhibit 9, for identification, and ask you if you recognize the signature.
>
> A. Yes.
>
> Q. Whose is it?
>
> A. Hazel Hix.
>
> • • • • •
>
> Q. When was that card signed?
>
> A. May 26th, 1966.
>
> Q. I hand you what has been marked General Counsel's Exhibit 10, for identification, which purports to be an authorization for representation. Do you recognize the signature on that card?
>
> A. Yes.
>
> Q. Whose is it?
>
> A. Nancy McClelland's.
>
> Q. When was that card signed?
>
> A. August 19th, 1966.

I admitted these two cards over the objection of Respondent's counsel that they had not been properly identified. He was afforded the opportunity to examine the witness on *voir dire* and to cross-examine her, but chose not to do so.

This was the extent of General Counsel's efforts to establish the genuineness of the signatures on these cards. I merely restate the obvious, for emphasis, by pointing out that Crowe did not testify that the cards were signed in her presence, or that they had come into her possession in connection with her duties as a steward for the Union. On the

other hand, the Company did not question her claim that she recognized the signatures of Hix and McClelland. It chose to forego examining her on her basis for comparing these signatures with other signatures of Hix and McClelland which she knew to be genuine. For all that appears here, Crowe's claim that she recognized the signatures might have been supported by exact and detailed knowledge based on her prior examination of many known genuine signatures of Hix and McClelland, or it might be an outright falsehood, or else based on ridiculously inadequate opinion. But neither the General Counsel nor the Company wished to inquire further, for reasons best known to themselves.

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Each was willing to rest his case on the barest minimum. For example, neither party claimed that Hix or McClelland was unavailable to testify, nor did Respondent attempt to prove the falsity of the signatures by comparing them with samples of authentic signatures from tax withholding forms, payroll records, etc., which it might have in its possession. Of course, it was unnecessary for the Respondent to put forth any effort to help the General Counsel prove his case, and the question as to whether I was right in receiving General Counsel's Exhibits 9 and 10 is whether the General Counsel's submission, through Crowe's testimony, established a *prima facie* case.

Respondent's brief states that "The Board and the Courts have consistently held that, if authentication by other than the signer is to be permitted, the party authenticating must have been a witness to the execution." The statement is incorrect. The cases do not so hold, nor do the three cases which Respondent cites in his brief for the proposition in fact support his argument. The Board will accept as authentic, for example, authorization cards which

were returned to the person soliciting them even though the solicitor did not witness the act of signing.[8]

Turning to the three cases cited by Respondent as supporting the contention set out above, in *The Colson Corporation,* 148 NLRB 827, the Trial Examiner rejected Stimel's card because he did not believe Crayne's testimony that Stimel had returned a signed card to him, rather than because Crayne had not seen Stimel sign the card. See footnote 5 of the Trial Examiner's Decision at page 840. In the second case, *Winn-Dixie Stores, Inc.,* 153 NLRB 273, 306, the Trial Examiner rejected Mobley's card because the testimony of Johnson, the solicitor, as to when the card was signed was not persuasive, rather than because he had not seen Mobley sign.

Nor does *Henry Colder Company,* 163 NLRB No. 13, support Respondent's argument that authentication of a signature may be established only through the testimony of the signer or of someone who witnessed the signing. It may be that *Colder* casts doubt on the precedental value of the holding in *I. Taitel and Son,* 119 NLRB 910, enfd. 211 F.2d 1 (C.A. 7), that cards may be authenticated by a union representative (a) where his testimony shows that they were obtained in the course of the union's organization campaign from key employees who secured them and (b) where opportunity is given the employer before or at the trial to check their authenticity. But whatever may be inferred from the Board's remand to the Trial Examiner in *Colder,* as to the *Taitel* holding, it does not have the scope which Respondent attributes to it, since in *Colder* itself the

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[8] *Texas Electric Cooperatives, Inc.,* 160 NLRB No. 33 (cards of Christian, Whinery, and others); *Gordon Manufacturing Company,* 158 NLRB No. 131 (Oliver); and *Lifetime Door Company,* 158 NLRB No. 3 (Holmes).

Board approved the genuineness of the cards signed by Arlene E. Locke whose authenticity was established through the comparison of the signature on the card with an admittedly genuine sample of the same person's handwriting. In the *Colder* case, the comparison of Locke's signature with other samples of her signature was made by a handwriting expert, and the use of such experts has been approved by the Board in other cases.[9] Furthermore, the Board has accepted a comparison of signatures even by nonexperts.[10]

There is thus no reason to believe that signatures must be authenticated in a more restrictive manner in Board proceedings than in other administrative or in judicial proceedings. Wigmore's treatise on Evidence (3d ed. 1940) supplies overwhelming precedent that the genuineness of signatures may be proved by the testimony of those who did not witness the actual signing. Handwriting experts may state their opinion as to whether A signed a particular document, by comparing A's purported signature thereon with his known genuine signatures; and nonexperts may state their opinions based on their familiarity with A's handwriting. The competency of a nonexpert witness to state an opinion as to the genuineness of A's signature may be tested by examining him on his claim that he is familiar with A's handwriting. But if the party who contests the genuineness of A's signature does not impugn the witness' claim of familiarity, the document is admissible in evidence,

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[9] *Aero Corporation*, 149 NLRB 1283, and *Benson Veneer Company, Inc.*, 156 NLRB 781, 792.

[10] *Philamon Laboratories, Inc.*, 131 NLRB 80, footnote 1 of I. R. enfd. 298 F.2d 176, 180; *Tom's Supermarket, Inc.*, 157 NLRB No. 106 (Tweedie's card).

and the question of genuineness is then left for the trier of fact.[11]

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To return to the specific evidence in the instant case, Crowe testified that she recognized Hix's and McClelland's signatures. Her assertion of recognition was in effect a claim that she was familiar with their signatures and had made a mental comparison of the purported examples shown to her with other examples which she knew to be genuine, and that in her opinion, the signatures on General Counsel's Exhibits 9 and 10 were indeed those of Hix and McClelland. If Respondent believed that Crowe was not competent to express an opinion because of her lack of familiarity with the signatures of Hix and McClelland, it need only have asked her on what she based her claim of being able to recognize these signatures. Its failure to do so was a calculated gamble, not an oversight, since it had already examined Whiteside on his claim of recognizing

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[11] See 7 Wigmore, *Evidence* § 2131 (3d ed. 1940).

Modes of Authenticating Documents. Some of the various possible modes of evidencing a document's genuineness are, of course, never questioned to be sufficient to entitle it to go to the jury. Those about which question has arisen are only certain kinds of circumstantial evidence.

It will be necessary therefore to eliminate at the outset the kinds of evidence as to which there is no dispute from the present point of view.

* * * * * *

(3) *Circumstantial evidence* is of various sorts; and first, of those not here involved:

(a) *Style of handwriting, i.e.,* similarity between that of the document and that of the person alleged as its maker, is a sort of circumstantial evidence (*ante,* § 383) undisputed in its sufficiency; the controversies have arisen over the proper modes of proving the fact of similarity.[4]

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[4] The type of handwriting may be evidenced by *persons familiar* with it (*ante* §§ 693, 2008); . . . (Underscoring in original.)

the signatures on the cards which had been signed in his presence, and was able to show the insubstantiality of his opinion. Respondent might have been able to do the same with Crowe if it had tried, but it chose not to.

On the basis of the thin and barely adequate identification by Crowe that she recognized the signatures on General Counsel's Exhibits 9 and 10 as being those of Hix and McClelland, I affirm my ruling admitting those exhibits in evidence, and find that the purported signatures are genuine, and the authorization cards valid.

The alleged misrepresentations: The signed cards which the Union obtained in its organizational campaign are headed "Authorization for Representation." The substantive provisions of the cards authorize the Union to represent the employee signing it for the purposes of collective bargaining in accordance with applicable law. Respondent's brief argues that the Union made material misrepresentations to most of the employees who signed.

It argues that Lana Pfeiffer's card should not be counted because Zellen told her that the "only" purpose of the card was to obtain an election, and that the Union needed cards from a majority of the employees to insure an election. Respondent's contention loses much of its force since its inquiries were based on its understanding at that time that Pfeiffer had signed a card on *Zellen's* solicitation. Pfeiffer's later testimony showed that this was not so. Pfeiffer said she had complained to Jackie Zellen that her wages were low, and Zellen had said the wages would be higher if they had a union. Zellen then said they needed so many girls to have a union, that she herself had signed up, and if Pfeiffer wanted to sign up she could be a member to help the majority. Zellen did not have an authorization card with her

and did not solicit Pfeiffer's signature. A few weeks later, on her own initiative, Pfeiffer asked Nancy McClelland to bring her a card when McClelland went to get hers. Pfeiffer's answer to Respondent's question as to whether Zellen had told her that the only purpose of the card was for an election was, "for a union, yes, for higher wages." The answer, as well as Pfeiffer's entire testimony, shows clearly that Zellen nor anyone else misrepresented the purpose or effect of the card.

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Zellen testified at one point that Crowe had told her that in order for the Union to obtain an election it needed cards of two-thirds of the employees. Respondent alleges that this is a material misrepresentation which should invalidate Zellen's card. This is apparently a claim that Zellen was misled into signing a card, but I fail to see why. Crowe told Zellen, according to the latter's testimony, that if the Company did not recognize the Union voluntarily they would then have an election if two-thirds of the employees had signed cards. The misstatement, or Zellen's misunderstanding of what Crowe told her, was not material since Zellen's testimony also clearly shows that she was told that an election would only be necessary if the Company refused to recognize the Union on the basis of a card check.

Respondent also contends that the five cards solicited by Union Representative Whiteside are invalid because "the obvious intent and effect of Whiteside's statements is that the only purpose of the card is to obtain an election." What Whiteside actually said was that the authorization cards would be used for a card check and if that failed, for an election. He also told the employees who signed the cards that companies usually do not agree to card checks, and if their employer, did not, they could vote as they pleased in

the election. He did not tell them, as Respondent contends he should have, that their authorization cards might be used to support a bargaining order or might supersede their vote. It is this omission, Respondent contends, which amounts to a representation that the only purpose of the card was to obtain an election. It is obvious that Whiteside was only soliciting cards, and not attempting to give a quick course in labor law. What he said was accurate and correct, and his basic point, that the cards could be used to establish the Union's majority without an election, is an accurate summary of what the cards themselves say.

In summary, I find that the Union had obtained 10 valid authorization cards when it requested recognition, and that this constituted a majority of the 15 employees in the unit of all store employees, excluding professional employees, guards and supervisors, which I have found appropriate.

E. *Alleged Violations of Section 8(a)(1)*

1. Before the election

The Company's supervisors immediately responsible for day-to-day operations at the Kenosha store during August and September were Donald Schneider, store manager; Charles Wearing, assistant store manager; and Dolores Davis, fountain manager. E. A. Montini, food service director, and Donald Bell, the personnel director, were management and supervisory officials with the duties and responsibilities indicated by their titles, for operations at all stores. Montini and Bell both visited the Kenosha store during September and spoke to various employees there.

Schneider, Wearing, Davis, and Montini were not called to testify, and their various conversations with store em-

ployees, as testified to by witnesses for the General Counsel, are in effect uncontradicted. Story, Zebrowski, and

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Zellen testified that Store Manager Schneider had spoken to each of them individually on many occasions between August 26 and October 12, the date of the election, telling them that the store would close down if the Union came in. Pfeiffer also testified that Schneider had told her several times, in effect, that there was no need to worry about little things because if the Union got in, the store would close down.

Story also testified that she participated in a conversation with Schneider, Sophie Zebrowski and her husband, and employee Evelyn Massie about September 10, when Schneider said he was planning to give everyone a raise to $1.50 per hour. Mrs. Zebrowski then asked him what guarantee they had that they would not be fired after the election, and that Schneider had promised that none of the girls would be fired if the Union did not come in. On another occasion, according to Story, Schneider asked her and Pfeiffer if there wasn't to be a union meeting the next day and when she said, "We know you've got your spies," he answered "Yes, I know everything that's going on with the union business."

A few days after the consent election was agreed to, Schneider asked Story if she would like to come in to work for a couple of hours on the day of the election, even though she was not scheduled to work that day. Story said she would be in to vote election day, to which Schneider said, "I thought you'd like to get some time in before the 12th, because if the Union gets in, you're not going to get any time in after the 13th."

Zellen testified that she had gone to the store on September 15 to meet Lana Pfeiffer and go with her to a union meeting. Schneider said to them that he did not know why they bothered going to a union meeting, it was not going to do them any good anyway, but that he could get a job anywhere.

Although Assistant Manager Wearing does not seem to have been as active as Schneider during this period, Zebrowski did testify that whenever she met him in the stockroom he also said that if the Union got in, the store would close.

Based on their uncontradicted testimony and their demeanor while testifying, I credit Story, Pfeiffer, Zellen, and Zebrowski and find that Schneider and Wearing made the statements recited above. I find that their remarks that the store would be closed if the Union came in, Schneider's offer to let Story work on a nonscheduled day, his statement that he was planning to raise everyone to $1.50 per hour, the threat implicit in his remark that none of the girls would be fired if the Union did not come in, and his statement implying that he knew what was going on with the union business, and that it would not do them any good to go to a union meeting, all constituted illegal interference, restraint, and coercion within the meaning of Section 8(a)(1).

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Pfeiffer testified that Davis, the fountain manager, asked her on two occasions in mid-September how she was going to vote in the union election. During this period, Davis also asked her if she had gone to a union meeting which had been held the evening before.

Pfeiffer and Zellen testified that in separate conversations with each of them Davis had told them that if any

applicants for employment appeared in response to a help-wanted advertisement which the Company had just run, that they were to find out whether the applicant was for a union, and if she was, to tell her that the job had already been filled or that the manager was not in to take the application.

Zellen also testified that a week or so before that conversation, Davis had told her, while Nancy McClelland was also present, that she, Davis, was to find out how they were going to vote.

Based on their uncontradicted testimony and their demeanor while testifying, I credit Pfeiffer and Zellen, and find that Davis made the statement recited above. Inquiries as to how an employee is going to vote, and whether she had gone to a union meeting, and orders to turn away applicants who are favorable to a union reasonably tend to intimidate employees in the exercise of their right to support a union and are thereby violative of Section 8(a)(1). I so find here.

Pfeiffer testified as to three conversations in September with Montini, the food service director. In the first such conversation, Montini asked her if she had been to union meetings and if she had a personal gripe, since anyone who wanted the Union must have a personal gripe. He also said that the fountain employees would not necessarily get a raise even though the other employees might, that they might lose their separate store and food discounts, and in the long run would lose more than they would gain if the Union got in. She also testified that Montini had said in the same conversation, that the fountain was a separate department in the store, that it was not making as much money as it should, and that he could close it any time.

In their second conversation, Montini told her he knew that she, Alberta (Story) and Jackie (Zellen) had been to a union meeting and asked her if she knew what wage rate the Union was offering. She said she did not, and Montini then said that if the Employer and Union decided on wages, it would not be more than $1.15 per hour and that the employees would lose their food and store discounts. Again he asked her what her gripes were and she told him that the employees were interested in the Union because they thought it could get them higher wages, to which he replied that he was not allowed to make any promises then, because it might look like a bribe but that in October the Company would decide which employees were deserving of a raise.

In their third conversation, a few weeks later but before the election, Montini repeated some of the points he had previously made, such as the loss of food discounts if the Union got in.

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Zellen's testimony as to her conversations with Montini substantially corroborates that of Pfeiffer. Zellen said that Montini told her he was there because of the union activities, that the fountain employees were overpaid at $1.10 per hour because employees at other stores were not given a store discount or a food allowance; and that if the employees obtained a union they would lose their discounts.

Based on their uncontradicted testimony and on their demeanor while testifying, I find that Pfeiffer and Zellen testified credibly as to what Montini said to them. I find that Montini threatened them with loss of their store and food discounts, and threatened Pfeiffer with closing down the fountain department if the Union won. His statement

that the employees would not get more than $1.15 per hour if the Union got in, accompanied by his statement that in October the Company would decide on raises would reasonably tend to impress on Pfeiffer and the other employees that their chances for wage raises would be improved if they defeated the Union. Respondent violated Section 8(a)(1) by Montini's threats and promises of benefits detailed above.

In connection with his duties as personnel director, Bell visited the Kenosha store about September 8 and 9 and spoke to all the employees individually. He testified that he did so because Kenosha was a fairly new operation and he wanted to inform himself about the personal background of the store employees, to explain the company benefits, and to find out what problems the employees might be having. Only Story and Zebrowski were called by the General Counsel to testify as to their interviews with Bell. During Bell's inquiry as to their problems, both Story and Zebrowski brought up their desire for more money. Bell took advantage of the opening thus presented him by telling them in effect that his hands were tied while the union business was unfinished, but that the Company was aware of the problem. Story amplified this by testifying that Bell also said everyone could count on a substantial raise in October, while Zebrowski said that Bell had told her the Company was in the process of talking about giving raises to the girls, but that their hands were tied now that the Union was talking about coming in. Bell testified that he said only that the Company reviewed wages in October.

I think it more likely that Bell limited himself to the remarks he testified to—that the Company reviewed wages in October. Although Story and Zebrowski forthrightly

told him in their interviews that they wanted more money, and thereby gave him a favorable opportunity to let them know that raises might be forthcoming next month, neither Story's nor Zebrowski's testimony indicates that the possibility or expectancy of a raise was conditioned on the Union's defeat. I am satisfied that the Company's annual wage review for employees at all its stores did occur in October. I find that Bell's implicit promise that their complaints about wages would be considered was made pursuant to the Company's regular practice of reviewing employee wages every October, and was not conditioned on their rejection of the Union. I therefore find no violation of Section 8(a)(1) in any of Bell's remarks to Story and Zebrowski.

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2. After the election

About 2 weeks after the election, and while the Union's objections were pending before the Regional Director, the Company granted wage increases to its employees. The complaint alleges that the grant of increases at that time was an independent violation of Section 8(a)(1), as well as a violation of Section 8(a)(5).

Within a week or so after the election, about half the employees at the store quit voluntarily. Some of these had been earning less that $1.40 per hour. Their replacements were hired at $1.40, and those old employees who remained and who were not above that minimum were given raises so that their new rates matched or exceeded the newly established minimum.

The Company argues that the grant of wage increases after the election was prompted by its normal policy of reviewing all wages throughout its chain of more than 100

stores each October; that it had already established a $1.40 minimum at the stores it was currently opening, because that was to be the new statutory minimum as of February, 1967, under the Federal Wage-Hour Laws, and because many of the employees who had recently quit had been dissatisfied with their low wages.

I consider these to be legitimate business considerations warranting the grant of wage increases at that time despite the pendency of the objections to the election. I am aware of those cases in which the Board has held that wage increases or benefits granted after an election while objections are pending, are in violation of Section 8(a)(1) as being calculated to influence the employees' choice of a bargaining representative if a second election were directed, and as a reward for having rejected the Union.[12] These were, however, cases in which the benefits granted would have been illegal, under the rationale of *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405, if they had been bestowed before the election. In the instant case, on the contrary, the evidence shows no deviation from the Company's normal and regular practice of reviewing wages throughout its entire chain of stores in October, and to make such adjustments as were called for by legitimate business considerations.[13]

On the basis of the evidence presented in this case, I believe that the wage increases granted late in October

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[12] *Ambox, Incorporated*, 146 NLRB 1520, 1521, enforcement denied on this point, 357 F.2d. 138, 141 (C.A. 5); *Northwest Engineering Company*, 148 NLRB 1136, 1144, enfd. 64 LRRM 2650 (C.A.D.C.) March 24, 1967; *Gal Tex Hotel Corporation, d/b/a Admiral Semmes Hotel and Motor Hotel*, 154 NLRB 338, 342; and *Ralph Printing & Lithographing Co.*, 158 NLRB No. 128.

[13] See *Sheboygan Sausage Company, Inc.*, 156 NLRB 1490, 1497, and *True Temper Corporation*, 127 NLRB 839, 842.

were justified by the approaching February 1967 deadline for raising the minimum under the Wage-Hour Laws, and were not, therefore, either premature or excessive. I find

no independent violation of Section 8(a)(1) thereby, but in view of my intention to find a violation of Section 8(a)(5) in the Company's refusal to recognize and bargain with the Union as the authorized representative of a majority of its employees in an appropriate unit, I nevertheless find that the unilateral institution of these wage adjustments was a violation of the Respondent's obligation to bargain with the Union.

F. *Alleged Violation of Section 8(a)(5)*

I have found that the Union represented a majority of the employees in an appropriate unit at the Company's Kenosha store when it requested recognition and bargaining. The General Counsel, however, is also obligated, as part of his case, to establish that the Respondent refused in bad faith to recognize and bargain with the Union after it attained its majority status or, as the principle is frequently stated in expanded terms, because it rejected the concept of collective bargaining or sought to use the time thus gained to undercut and destroy the support of its employees for their chosen representative. The independent violations of Section 8(a)(1) which I found have occurred were pervasive and substantial. They consisted of threats by every one of the three supervisors in actual charge of the store's operations, and by Montini, who because he represented a higher level of management would tend to impress upon the employees the concern which top officials of the Company felt about their activities. Four employees, out of a total of 16 nonsupervisory employees,

testified credibly to the month-long effort of the Respondent to convince them of the dire consequences likely to result from their continued support of the Union, through their threats and coercive interrogations. In circumstances such as these, the Respondent's reliance on cases in which the Board found no causal relationship between isolated violations of Section 8(a)(1) and the loss of the Union's majority is misplaced.[14]

Affirmatively, Respondent contends that it had a good-faith doubt as to the Union's claim of majority representation. Its argument that the Union's conduct on August 24 in sending it three separate communications was ambiguous and inconsistent, has already been considered and rejected. It also relies on the fact that the Kenosha store has been in operation only 8 or 9 months, that it had had a high rate of employee turnover, and that it had always at-

tempted to keep in close contact with its employees and was therefore dubious of the Union's claim on the extent of the support it had won at the store. It also urges, as evidence of its good-faith doubts, that it was willing to proceed with a consent election to test the Union's claims. These assertions might, in other circumstances, have established a good-faith doubt, but here their force has been effectively blunted by its aggravated conduct in coercing

[14] Compare *Aaron Brothers Company of California,* 158 NLRB No. 108, *Hammond & Irving, Incorporated,* 154 NLRB 1071, and *Cameo Lingerie, Inc.,* 148 NLRB 535, which the Respondent relies on, with the following cases in which the Board, with court approval, held that the employer had rejected the union's request to bargain, in bad faith: *Elliott-Williams Co. Inc.,* 143 NLRB 811, enfd. 345 F.2d 460 (C.A. 7), *Boot-Ster Manufacturing Company, Inc.,* 149 NLRB 933, enfd. 361 F.2d 325 (C.A. 6), *Gotham Shoe Manufacturing Co., Inc.,* 149 NLRB 862, enfd. 359 F.2d 684 (C.A. 2), and *Frank C. Varney Co. Inc.,* 151 NLRB 280, enfd. 359 F.2d 774 (C.A. 3).

and intimidating its employees, thereby making impossible a fair test of the Union's majority claims.

The Respondent also contends that a bargaining order against it would not be warranted because the Union has in the meantime lost the effective support of its former adherents, and because the doctrine of the *Bernel Foam* case, 146 NLRB 1277, is not applicable here. I will consider the contentions in that order.

Respondent expresses concern that its present employees will be deprived of their right to refrain from self-organizing activities if a bargaining order is issued here. It is true that seven employees left almost immediately after the election, and that apparently none of them claimed that the Union's loss of the election was the reason for their quitting. It is worthy of note, however, that all seven had signed authorization cards. In any event, the Respondent argues that the Union would have lost its majority without regard to whether Respondent had committed some unfair labor practices. In effect, it seeks to benefit from its own illegal actions in thwarting its former employees' desire for representation by advocating the right of its present employees to refrain from such activities. The Supreme Court's decision in *Franks Brothers Company* v. *N.L.R.B.*, 321 U.S. 702, exposes the untenability of Respondent's argument.

Since the facts in no two cases are ever exactly alike, the Respondent is able to point out certain factual differences between this case and *Bernel Foam Products Co., Inc.* 146 NLRB 1277.[15] In *Bernel*, the petition was filed after a

[15] In *Bernel*, the Board reverted to its former doctrine that a union may be entitled to a bargaining order based on its majority status even though it had lost an election in which it participated with knowledge of the employer's commission of unfair labor practices.

request for recognition was refused; here, it was filed simultaneously with the request. Respondent argues that *Bernel* does not govern this case since here the refusal to bargain did not induce the filing of the petition, and consequently that the Union had a genuine choice of remedies here, unlike the union in *Bernel.* I think the factual differences between the two cases are immaterial. Before *Bernel,* a union, knowing of an employer's unfair labor practices, had a one-time choice between proceeding with an election or seeking a bargaining order. The reversal of that doctrine was intended to abolish the necessity of making that choice,

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and to permit a union to go forward with the election and thereafter, if it lost, to prove its preexisting majority in an unfair labor practice proceeding. Respondent's distinction based on which came first, the petition or the request, would merely impose an illogical limitation on what the Board clearly intended to accomplish.[16]

Respondent also relies on another factual distinction between this case and *Bernel* to argue that the Union should be limited to a choice between an election or an 8(a)(5) proceeding. It points out that here the Union filed charges of 8(a)(1) violations after it filed its petition but before the election was held. In conformity with Board regulations, it also requested the Regional Director to proceed with the election despite its pending charges. After the election, it filed objections and an unfair labor practice charge alleging a wrongful refusal to bargain. Respondent contends that this gave the Union an even greater advantage than it was entitled to under the *Bernel* doctrine,

[16] *Midwestern Manufacturing Company, Inc.,* 158 NLRB No. 144, and cases cited in footnote 3 thereof.

in allowing it to keep its 8(a)(1) charges in abeyance until it knew whether it had won or lost the election, and then to rely on those as the basis for its 8(a)(5) charge. This is said to permit the Union to harass the Respondent and to abuse Board processes. Like the previous argument, Respondent's concern that the Union may act only in a fixed step-by-step fashion, is misplaced. That the Union filed 8(a)(1) charegs before, instead of after the election, does not affect the Board's reasons for allowing a union to participate in an election and then prosecute a refusal-to-bargain charge. The Respondent believes the *Bernel* doctrine is unfair, and it is entitled to urge the Board to overturn it, but its attempt to pay lip service to it while distinguishing this case from it factually, is no more than a roundabout attack on *Bernel* itself.

IV. Objections to the Election

The Union filed timely objections to the conduct of the election. The Regional Director's report on the objections refers to evidence tending to show that between the filing of the petition and the election, supervisors and agents of the Respondent coercively interrogated employees concerning their union activities, threatened them with the closing of the Kenosha store and other reprisals, and promised them increases in wages and other benefits if they rejected the Union. I see no reason to consider other conduct which was alleged in the objections as grounds for setting the election aside since, in my opinion, the evidence at the consolidated hearing before me amply supports the conclusion I have reached that the election should be set aside, and that the Respondent should be required to bargain with the Union as the exclusive representative of its employees at the Kenosha store, based on its majority status as of August 26, 1966.

It is also immaterial that the objections did not specify all the conduct which I have found to be grounds for setting the election aside. The decision as to whether an election should be set aside is properly made on the basis of the

investigation or hearing, and not on the allegations specified in the objections to the election.[17] Here, moreover, the complaint alleged in what respects Section 8(a)(1) had been violated before the election, and such violations, if proved, are *a fortiori* grounds for setting the election aside, so long as timely objections were filed.

Conclusions

Accordingly, for the reasons stated above, I conclude that Respondent, by rejecting the Union's request on August 26, for recognition and bargaining, and thereafter engaging in unfair labor practices designed to destroy the Union's majority, refused to bargain with the Union in violation of Section 8(a)(5) of the Act.[18] I also find that by unilaterally raising the wages of its employees in October at a time when the Union was entitled to exclusive recognition as bargaining agent, Respondent violated the same section.[19]

Furthermore, even if I were to assume that the Company acted in good faith in insisting upon an election, a bargaining order is nonetheless appropriate in order to undo the effects of its subsequent unfair labor practices.[20]

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[17] *International Shoe Company*, 123 NLRB 682.

[18] *N.L.R.B.* v. *Joy Silk Mills, Inc.*, 185 F.2d 732 (C.A.D.C.).

[19] *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736.

[20] *N.L.R.B.* v. *Stow Manufacturing Co.*, 217 F.2d 900 (C.A. 2) and *Irving Air Chute Company, Inc.*, 350 F.2d 176 (C.A. 2).

Finally, the Board and the courts have also held in a number of cases, that where an employer's violations of Section 8(a)(1) have dissipated a union's majority and prevented the employees from freely exercising their choice of representatives, the Board may, in order to remedy the unfair labor practices, issue an order directing the employer to bargain with the union on request, provided that the union had a majority at all relevant times.[21] Under the doctrine of these cases also, a bargaining order is appropriate in this case.

Conclusions of Law

1. All employees at Respondent's Kenosha, Wisconsin, store, excluding the store manager, assistant store manager, lunch counter manager, professional employees, guards, and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times since August 24, 1966, the Union has been the duly designated bargaining representative of the employees in the aforesaid collective-bargaining unit.

3. The Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1), by threatening them that the Kenosha store or its fountain department would be closed down or that they would lose their store or food discounts, by promising them wage increases and other benefits, by coercively interrogat-

[21] *Editorial "El Imparcial" Inc.* v. *N.L.R.B.*, 278 F.2d 184, 187 (C.A. 1), and [redacted]*R.B.* v. *Delight Bakery Inc.*, 353 F.2d 344 (C.A. 6).

ing them as to how they were going to vote, or if they had attended union meetings, by intimidating them through its orders to reject applications for employment from pro-union applicants, and by telling them that their attendance at union meetings had been observed and noted.

4. By failing and refusing on August 26, 1966, and at all times thereafter, to recognize and bargain with the Union as the collective-bargaining representative of the employees in the aforesaid unit, and by unilaterally changing the wages of employees in October 1966, without notice to or consultation with the Union, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, my Recommended Order will provide that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As indicated above, an order to bargain collectively with the Union is appropriate to remedy the Company's violations of the Act. Even in the absence of a refusal to bargain, I would find this remedy appropriate in the circumstances of this case in view of the Company's extensive violations of Section 8(a)(1), which prevented the employees from exercising a free choice in the election. In view of these conclusions, my Recommended Order will pro-

vide for dismissal of the pending representation proceedings, Case 30—RC—508.

The unfair labor practices found here are such as to indicate an attitude of opposition to the purposes of the Act generally. I find therefore that a broad cease-and-desist provision is necessary to effectuate the policies of the Act.

In its brief, the Union has asked me to recommend additional remedial provisions to enable it to retrieve the losses it sustained through the Company's unfair labor practices which effectively denied it the support of the unit employees it had previously enjoyed. It asks for provisions giving

it access to the Company's bulletin boards and premises under appropriate conditions, the opportunity to address unit employees on Company time and property during the compliance period, for additional relief of an unspecified nature to restore its economic strength to what it was when the Company refused to bargain with it, and to compensate it for its organizational expenses if the parties are unable to reach an agreement under the bargaining order. As an alternative, the Union suggests a remedial provision recently recommended by another Trial Examiner in a similar case, to make the employees whole by paying them the difference between the compensation they actually received and the rates received by employees in comparable units under union contracts for the period of the refusal to bargain.

Although I appreciate the Union's position that its bargaining strength has been seriously eroded by the Company's unfair labor practices, and that it is entitled to a restoration of the situation as it would have been, absent the unfair labor practices, it is nevertheless a question of

judgment whether the remedy I have prescribed above is in fact inadequate. Trial Examiners have, in the first instance, a responsibility to exercise their judgment in fitting the remedy to the violation, but with a proper regard for long-established Board practices in these matters. Since some, if not all of the proposals suggested by the Union, have been advanced in other cases now pending before the Board, I believe it would be a gratuitous gesture on my part to order such novel remedies until the Board has established guidelines in similar cases. I therefore deny the Union's request.

RECOMMENDED ORDER

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, it is recommended that the National Labor Relations Board order that Thrift Drug Company of Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees that its Kenosha store or its fountain department would be closed down or that they would lose their store or food discounts because of their union activities.

(b) Promising employees wage increases and other benefits in order to interfere with their free choice of representatives.

(c) Coercively interrogating them as to how they were going to vote or if they had attended union meetings, intimidating them by ordering the rejection of applications for employment from prounion applicants, and telling them that their attendance at union meetings had been observed and noted.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to join, or assist Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

(e) Refusing to recognize and bargain collectively with Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit set forth in the conclusions of law above.

(f) Instituting changes in the wages, hours or other conditions of employment of its employees without notice to, or consultation with, Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, as their exclusive bargaining representative.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, as the collective-bargaining representative of all its employees in the appropriate unit set forth in the conclusions of law above, with respect to rates of pay, wages, hours of employment, or other terms of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its store at Kenosha, Wisconsin, copies of the attached notice marked "Appendix."[22] Copies of said notice, to be furnished by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[23]

The petition for certification of representatives in Case 30—RC—508 is hereby dismissed.

Dated at Washington, D.C.

CERTIFIED TRUE COPY

O. W. FIELDS

EXECUTIVE SECRETARY NLRB

DATE MAY 24 1967

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[22] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[23] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 30, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT threaten employees that our Kenosha store or its fountain department will be closed down or that they will lose their store or food discounts because of their union activities.

WE WILL NOT promise wage increases or other benefits in order to interfere with a free choice of representatives by our employees.

WE WILL NOT coercively interrogate our employees as to how they are going to vote or if they have attended union meetings, nor will we intimidate them by ordering them to reject applications for employment from prounion applicants, nor tell them that their attendance at union meetings has been observed and noted.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to join or assist Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL NOT institute changes in the wages, hours or other conditions of employment of our employees without notice to, or consultation with, Retail Clerks Union

Local 526, Retail Clerks International Association, AFL-CIO, as their exclusive bargaining representative.

WE WILL bargain, upon request, with the above-named labor organization as the exclusive bargaining representative of all employees in the unit described below, with respect to wages, rates of pay, hours of employment, or other terms of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees at our store in Kenosha, Wisconsin, excluding the store manager, assistant store manager, lunch counter manager, professional employees, guards and supervisors as defined in the Act.

All our employees are free to become or refrain from becoming members of the above-named labor organization or any other labor organization.

THRIFT DRUG COMPANY OF PENNSYLVANIA
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any queston concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Second Floor, Commerce Building, 744 North Fourth Street, Milwaukee, Wisconsin, 53203, Telephone 272-3861.

APPENDIX C

Excerpt From Petitioner's Brief Filed With the Court of Appeals for the Sixth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 18216

THRIFT DRUG COMPANY OF PENNSYLVANIA,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND SETTING ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD IN CASE NOS. 30-CA-458 AND 30-CA-508

BRIEF ON BEHALF OF PETITIONER

POINT VII

A BARGAINING ORDER IS AN IMPROPER AND INAPPROPRIATE REMEDY.

A. The Board Is Restricted to the Use of Secret Ballots for the Resolution of Representation Questions.

The legislative history of the National Labor Relations Act, as amended, clearly establishes that it was the intent

of Congress to limit the methods used for the selection of a collective bargaining representative to the secret ballot election and none other.[43]

The Board in support of its request for a bargaining order cites as authority cases decided prior to the Act's 1947 amendments or decisions which themselves cite pre-1947 decisions as controlling authority.[44] These amendments radically changed the Board's powers and responsibilities under Section 9(c).[45] Until recently a critical examination of the Board's powers under the Act, both before and after the 1947 amendments, had never been made by either the Courts or the Board.[46] An examination of the policy changes expressed in the Taft-Hartley Amendments reveals that the Board was stripped of its power to issue a bargaining order where a question of representation has been raised.

The relevant portions of Section 9(c) state:

> "(1) *Whenever* a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition. . . . If the Board finds upon the record of such hearing that such a question of representation exists, *it shall direct an election by secret ballot and shall certify the results thereof.*" (Emphasis added.)

This section *requires* that "*Whenever* a petition shall have been filed" and the Board "finds . . . a question of

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[43] *NLRB* v. *Logan Packing Co., supra.*

[44] See the analysis of cases, *supra,* pp. 69-71.

[45] 61 Stat. 136 (1947), 29 U.S.C. §§151-168 (1964).

[46] *Logan Packing Co., supra,* 66 LRRM at 2602.

representation exists", the Board "*shall* direct an election by secret ballot and *shall* certify the results thereof." *The Board is without authority to determine representation by other means once a petition has been filed and it has found a question of representation exists.*

1. The law prior to 1947.

Section 7 of the Wagner Act protected the right of employees to belong to unions, but gave no protection to those employees who wanted to refrain from union activities. Furthermore, under the Wagner Act, the Board had far greater latitude in the methods it could use to determine representation. The Wagner Act stated that the Board could determine representation by either "a secret ballot of employees, or . . . *any other suitable method.*" Section 9(c) of the Wagner Act provided:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties . . . the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and *may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.*" (Emphasis added.)

Accordingly, under that Act, the Board used as alternatives to elections, two informal non-election procedures: the "recognition agreement" and the "consent cross-check", both of which it codified in its rules and regulations and

statements of procedures. In its last Wagner Act Statements of Procedure (29 C.F.R.—NLRB Statements of Procedure §§202.1-28, 11 Fed. Reg. 177A-619, eff. Aug. 28, 1946) Section 202.17 described the non-election methods of determining representation as follows:

> "(a) The *recognition agreement* is used in a situation in which the employer is satisfied that the claims of the petitioner to representation rights are valid. . . .
>
> "(b) In the consent cross-check agreement procedure, the parties agree that a Board agent may determine whether or not the union represents the majority by comparing the number of valid signed cards submitted by the union with an appropriate payroll furnished by the employer. The agreement also describes the appropriate unit of employees involved and sets forth the understanding of the parties."

After some years of experience the Board began to question the conclusiveness of card checks[47] and found "that an election is generally the most effective and satisfactory method of resolving representation disputes." [48] Accordingly, "the election was the method almost invariably

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[47] See *Joe Hearin, Lumber,* 66 NLRB 1276 (1946), where the Board stated: "We do not feel, however, that a card check reflects employees' true desires with the same degree of certainty as . . . an election." (at 1283)

Electro Metallurgical Company, 69 NLRB 772 (1946), where the Board stated, that it "will not consider the card check as satisfactory as the election method of ascertaining the true desires of employees." (at 774)

And, *National Waste Material Corp.,* 93 NLRB 477 (1951), where the Board observed: "We have heretofore held that a card check is not entitled to the conclusive effect normally given to a certification of representatives based on a Board-directed election." (at 478)

[48] 8 NLRB Ann. Rep. 52 (1943).

utilized by the Board in contested [representation] cases ever since 1939." [49] In *The Cudahy Packing Company*, 13 NLRB 526 (1939), the Board explained its change of policy by pointing out that its certification "looks to the initiation of collective bargaining between the Company and its employees . . . [and] . . . the bargaining relations which result will be more satisfactory from the beginning if the doubt and disagreement of the parties regarding the wishes of the employees is, as far as possible, eliminated. Although in the past we have certified representatives without an election . . . we are persuaded by our experience that *the policies of the Act will best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot.*" (at 531-32) (Emphasis added.)

With the law giving no protection to employees who did not want union representation, and specifically authorizing the NLRB to resolve questions concerning representation by any method it considered "suitable", the Board and the courts, in their decisions which *preceded* the 1947 Amendments construed Section 8(a)(5) and Section 9(a) as giving rise to a duty to bargain before election and before certification of the union.

It was during this pre-1947 period, that the cornerstone case of *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, (1944), was decided. Pursuant to the policy considerations then manifest in the Act, the Board issued a bargaining order after the withdrawal of an election petition and the filing of a refusal to bargain charge. The Board deemed a bargaining provision "necessary to effectuate the policies of the Act" (at 704).

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[49] 13 NLRB Ann. Rep. 21, n. 7 (1948).

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In 1947, the policies set forth by the Act changed.

2. Changes wrought by the Taft-Hartley Amendments.

The policy considerations manifest in the amendments to the Act in 1947 were in direct opposition to the policies then existing. Section 7, the employees' bill of rights, was amended to protect the right of an employee *"to refrain from any or all"* representation or activity.

In addition, Congress while leaving unchanged Section 8(a)(5) and 9(a), eliminated from Section 9(c) the language which had theretofore authorized the Board to resolve questions concerning representation by any "suitable method". This same deletion was made in Section 10. In place of these sections, Congress authorized "an election by secret ballot" as the only method of resolving a question of representation.[50]

The Taft-Hartley Act's legislative history confirms beyond doubt that this was the specific Congressional intent. The Hartley bill (H.R. 3020, 80th Cong. 1st Sess. (1947)) (Section 9 (c)(1) & 9 (c)(4)) *eliminated* the Wagner Act option to "utilize any other suitable method to ascertain . . . representatives". The House Committee Report on the Hartley Bill (H.R. Rep. No. 245, 80th Cong. 1st Sess. 39 (1947)) had these comments on what was later adopted verbatim as Section 9 (c)(4) of the present Act:

> "Section 9(h)—The present act does not, by its terms, provide for so-called 'consent elections' but the Board frequently holds them. The bill permits parties to waive hearings before the Board (providing no other

[50] Swigert, *The Duty To Bargain In The Absence Of Certification Proceeding*, 19 Ann. Conf. On Labor, N.Y.U. 61 (1967).

interested person intervenes and objects), but when the parties waive a hearing, *the Administrator must conduct a secret ballot, not check membership cards as the Board sometimes has done in the past.*" (Emphasis added.)

The Senate Minority Report on the Taft bill (S. Rep. No. 105, Part 2, 80th Cong. 1st Sess. 34 (1947)) confirms that both proponents and opponents of the change agreed on its effect. It had these comments on what was later substantially adopted as present Section 9(c)(1) and 9(c)(4):

"Section 9(c)(4) provides that nothing in the section shall be construed to prohibit 'the waiving of hearings by stipulations for the purpose of a *consent election* in conformity with the regulations and rules of decision of the Board.'

"*The effect of this provision read together with the provisions of Section 9(c)(1)(B) would be to prohibit the Board from determining an issue concerning representatives by means of a consent card check.* This procedure is utilized only where the parties consent and consists of a check of the union's membership cards against the names appearing on the employer's payroll . . .

"*. . . the bill in this respect would deprive the Board of a proved and useful technique* which the Board has been able to utilize in over 20 per cent of the adjusted representation cases. . . ." (Emphasis added.)

Noting the changes in the basic policy of the Act, the House Conference Report stated that:

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"Both the House Bill and the Senate Amendment provided that if the Board found upon the hearing that a question of representation existed, a secret ballot should be held and the results thereof certified." (H.R. Rep. No. 510, 80th Cong., 1st Sess. 50 (1947))"

The Board agreed that its power had been changed, stating in 13 NLRB Ann. Rep. (1948):

"Section 9(c) of the Act, as amended, prescribes the election by secret ballot as the *sole* method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed (but rarely exercised) to utilize other 'suitable means' of ascertaining representatives." (at 32) (Emphasis added.)[51]

And, in *General Box Co.*, 82 NLRB 678 (1949), the Board explicitly rejected the concept of certification without an election in the following language:

"The concurring opinions of our colleagues propose that the Board certify the Petitioner here without an election, apparently after some other type of investigation of its majority status. Aside from the fact that such a procedure might well stimulate collusion and raise more problems than it would solve, we must point

[51] See also, 14 NLRB Ann. Rep. 26 (1949): "The Act as amended no longer leaves the Board with discretion to utilize any other suitable method than the secret ballot election to resolve a question concerning representation found to exist within the meaning of Section 9(c)." The Board subsequently deleted all references to "recognition agreement" and consent cross-check methods from its Statements of Procedure and its Rules and Regulations. NLRB Statements of Procedure, 29 C.F.R. §§202.1.36, Series 5; NLRB Rules and Regulations, 29 C.F.R. §§203.1-97, 12 Fed. Reg. 5656 (eff., August 22, 1947).

out that *the 1947 amendments deprived the Board of the power to certify without an election.*" (at 683) (Emphasis added.)

In addition to the foregoing amendments, Congress in 1947 amended Section 7 of the Act by specifically adding to the right to bargain collectively, the equal and specific right to *not bargain collectively* as the employees may freely choose. The 1947 amendments also resulted in the enactment of Section 9(c)(1)(B) in which Congress specifically granted to an employer the right to request an election whenever a union "presented to him a claim to be recognized as the representative defined in Section 9(a)."

This legislative history abundantly proves the depth of Congressional intent to establish as paramount federal policy the fact that employee rights to bargain collectively and to not bargain collectively are *equal* under the Act, and that these rights would be protected to the maximum possible degree by making a secret ballot election the *sole* method of representation determination.[51a] It would follow that the law should have changed with respect to the duty to bargain before election and certification.

3. Failure of the Board and the Courts to conform to new policy.

After the mandate from Congress in 1947, questions concerning representation should have been decided by the Board only by secret ballot election, the determination of majorities by card checks or by any device other than secret ballot election should have ended. This seems partic-

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[51a] Requiring elections before recognition in all cases would preclude the possibility of "sweetheart" contracts.

ularly true in view of the new requirement in Section 7 that the Board give equal protection to the non-union employees.[52] To give full scope to this right, a secret ballot would appear to be uniquely appropriate. In the leading case *after* 1947, *Joy Silk Mills* v. *NLRB*,[53] the Court of Appeals for the District of Columbia followed *Franks Bros., supra,* ignoring the legislative changes of 1947. In *Joy Silk Mills, supra,* the Court held that the "decision in *Franks Bros. Co.* v. *NLRB* . . . appears controlling, and the order of the Board is entitled to be enforced in the respect just discussed." [54]

Despite the clear change in policy manifest in the Act, in virtually every authorization card case the Courts rely on *Franks Bros., supra,* for the propriety of the compulsory bargaining remedy, permitting a union to become an exclusive representative without a 9(c) election. The endorsement of this remedy in *Franks Bros., supra,* may have effectuated the policies of the Act in 1944, but in 1947 the policies changed. Nevertheless, pre-1947 precedent that secret ballot elections were not the exclusive method of determining representation has unjustifiably survived, unexamined, screened by a myriad of inapplicable cross-citations.[55]

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[52] Swigert, *supra,* at 64.

[53] 185 F. 2d. 732 (D.C. Cir. 1950) *cert. den.* 341 U.S. 914 (1951).

[54] *Joy Silk Mills, supra,* at 745.

[55] A clear acknowledgment of this lack of analysis in the past on the part of the various appeals courts in card decisions, is set forth in *Logan Packing Co., supra.* The Court stated:

"... with no reference to the change wrought by Taft-Hartley, bargaining orders have been enforced in recent years on the authority

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The authorities relied upon in *Joy Silk Mills, supra,* were four pre-1947 decisions. The decisions cited in *United Mine Workers of America et al.* v. *Arkansas Oak Flooring Co.,* 351 U.S. 62, 71, 72 (1956), another leading case, are either pre-1947 cases or decision by Courts of Appeals which similarly are supported by rote citation of old cases.

4. The Board's legal authority does not support its case.

The Board supports its bargaining order by legal authority which builds on the foundation of *Franks Bros. Co.* v. *NLRB, supra,* which is the ultimate authority relied on by all the other courts which have dismissed challenges to the Board's power to obtain a bargaining order. Subsequent court decisions cite *Joy Silk Mills Inc., supra,* other pre-1947 decisions, such as *Franks Bros., supra,* or *NLRB* v. *P. Lorillard Co.,* 314 U.S. 512 (1941), or other court decisions which rely on these cases.

All of the court cases which the Board consistently cites as upholding its right to utilize bargaining orders under

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of cases decided under the Wagner Act before the 1947 amendments. Those which are not supportable on the basis of the absence of any litigible factual question concerning representation should, at the very least, have taken note of the 1947 amendment, but oddly, none of them have. Cases holding that a refusal to bargain is a violation of 8(a)(5) when there is no question of representation have been lumped with cases construing the original Wagner Act 9(c) to enforce bargaining orders without regard to the essential predication of the earlier decisions.

• • •

"Without reference to the current statutory provisions, however, such decisions lack persuasive impact. Congressional enactments may not be ignored by judges. . . ." (66 LLRM at 2602) (Emphasis added.)

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Bernel Foam Products Co. Inc.,[56] such as the instant matter, share the common defect of depending on *Franks Bros. Co., supra,* or cases relying on it, or on other pre-1947 decisions:

(1) *Amalgmated Clothing Workers of America* (*Edro Corp.*) v. *NLRB,* 345 F. 2d 264 (2 Cir. 1965), cites *Joy Silk Mills, supra.*

(2) *I.U.E.R.M.W.* (*S.N.C.Mfg. Co.*) v. *NLRB,* 352 F. 2d 361 (DC Cir 1965) *cert. den.* 382 U.S. 902 (1965) cites *Joy Silk Mills, supra,* as "controlling here on most aspects of the case."

(3) *Colson Corp. NLRB,* 347 F. 2d 128 (8 Cir., 1965), cited *United Mine Workers* v. *Arkansas Oak Flooring Co., supra,* as upholding bargaining orders, but the footnote in that decision dealing with the issue primarily relies on *NLRB* v. *Bradford Dyeing Ass'n.,* 310 U.S. 318 (1940), which was before the Taft-Hartley amendments.

(4) *Irving Air Chute Co.* v. *NLRB,* 350 F. 2d 176 (2 Cir., 1965), relied upon the pre-1947 *P. Lorillard Co., supra.*

(5) *NLRB* v. *Delight Bakery, Inc.,* 353 F. 2d 344 (6 Cir., 1965), also relies on *P. Lorillard Co., supra* and *Franks Bros. Co., supra.*

Similarly, other cases frequently cited by the Board have the common thread of reliance upon *Franks Bros. Co., supra,* other pre-1947 decisions, or each other:

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[56] 146 NLRB 1277 (1964). The Board there held that proceeding to an election with knowledge of the employer's unlawful refusal to bargain does not preclude the union from seeking a bargaining order after the election loss.

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(1) *Texarkana Bus Co., Inc., et al.* v. *NLRB,* 119 F. 2d 480 (8 Cir., 1941), was decided prior to the 1947 amendments and did not review the Board's power to issue a bargaining order.

(2) *D. H. Holmes Co. Ltd.* v. *NLRB,* 179 F. 2d 876 (5 Cir., 1950) relies on *Franks Bros. Co., supra.*

(3) *NLRB* v. *Calderera,* 209 F. 2d 265 (8 Cir., 1954), relies on *Texarkana Bus, supra.*

(4) *Summit Mining Corp.* v. *NLRB,* 260 F. 2d 894 (3 Cir., 1958) relies on *Texarkana, supra, D. H. Holmes Co., Ltd., supra, and Calderera, supra.*

(5) *NLRB* v. *Epstein,* 203 F. 2d 482 (3 Cir., 1953), relies on *Joy Silk Mills, supra,* and another decision which itself relied on *Joy Silk Mills, supra.*

In the instant case, the Board, in arriving at its decision, relied upon *Bernel Foam, supra.* Petitioner submits that *Bernel Foam, supra,* resting as it does on the authority of *Joy Silk Mills, supra,* and *Franks Bros. Co., supra* is not controlling, as those decisions "lack persuasive impact", having been decided "without reference to the current statutory provisions." [57]

Obviously, neither *Franks Bros. Co., supra,* nor the other pre-1947 decisions are apposite here for they were decided before the Taft-Hartley amendments establishing the pre-eminence of employee voting choice as determinative of union representation.

Nor can the Board claim its expertise and administrative discretion deprive this Court of power to review

[57] *Logan Packing Co., supra,* 66 LRRM at 2602.

its conclusion that a bargaining order is the only remedy for Petitioner's unfair labor practice. Since administrative discretion is limited to the precise statutory language by which Congress empowered the agency to act, the remedy deemed appropriate must be consistent with the statutory policy; and this Court is empowered to keep the Board's remedy within that policy.

Any Board argument to the contrary must be rejected on the basis of the recent Supreme Court decision in *NLRB* v. *Brown*, 380 U.S. 278, 85 S. Ct. 980 (1965) affirming the Tenth Circuit's refusal to enforce a Board order. The Board argued that its "decision is within the area of its expert judgment" and the Court of Appeals therefore "exceeded the authorized scope of judicial review." The Supreme Court answered as follows:

> "Reviewing courts are not obliged to stand aside, and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of

major policy decisions properly made by Congress'." (Citations omitted) (at 291)

The language of the Court could not be more in point, and the compelling requirements of the statutory policy require the same result herein: rejection of the Board bargaining order.

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No. 1213

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

LOU DE YOUNG'S MARKET BASKET, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W., GRAND RAPIDS, MICHIGAN 49502 — PHONE GL 8-5326

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

LOU DE YOUNG'S MARKET BASKET, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on January 17, 1969.

OPINIONS BELOW

The opinion of the National Labor Relations Board is reported at 159 N.L.R.B. No. 54, 62 LRRM 1447 (1966). The opinion of the Court of Appeals for the Sixth Circuit enforcing the order of the Board is not officially reported yet but is unofficially reported at 70 LRRM 2262 (1969).

JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were made and entered on January 17, 1969, and copies thereof are appended to this petition in the Appendix at pp. 34-46. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The National Labor Relations Board found that Petitioner, a Corporation operating retail stores in Grand Rapids and Holland, Michigan, violated the National Labor Relations Act [29 U.S.C. §§ 158(a)(1), (3) and (5)] by (1) unlawful interrogation, threats and promulgation of a no-solicitation rule (a total of seven 8(a)(1) violations), (2) discriminatory discharges of three employees and (3) refusing to recognize and bargain with the Union in a unit limited to certain employees of the Grand Rapids store. The Court of Appeals for the Sixth Circuit enforced the Board's Decision and Order in its entirety. The questions presented are:

1. Is an employer, irrespective of his other unfair labor practices, justified in refusing to recognize a Union that bases its claim to representative status solely on possession of authorization cards signed by a majority of employees?

2. Does an employer violate Section 8(a)(5) of the Act and lose its right to a reasonable time to investigate an alleged majority after refusing recognition of a Union that bases its claim to representative status solely on authorization cards, where the employer promptly retains legal counsel after the refusal, and then several days later offers to bargain with the Union?

3. Were the employer's unfair labor practices which occurred early in the Union's organization campaign, coupled with its refusal to recognize the Union that

bases its claim to representative status solely on authorization cards, legally sufficient to establish the employer's lack of good faith doubt as to the Union's majority where there is no proof that any of the unfair labor practices had the effect of destroying the Union's majority?

4. Is an employer, irrespective of his other unfair labor practiees, justified in refusing recognition of a Union that bases its claim to representative status solely on authorization cards where the employer has a good faith doubt that the unit requested is appropriate?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of 29 U.S.C. §141, *et seq.*, the National Labor Relations Act, as amended, are set forth in the Appendix at pp. 12-14.

STATEMENT

Petitioner is a Michigan corporation operating one retail food store in a Grand Rapids suburb and another in Holland. The corporation's sole stockholders are Lou DeYoung, President and Simon Wedgwood, Vice President and Secretary, who jointly manage the business.

The Union began its organizational campaign on December 8, 1964 (125a)[1] and limited all of its efforts to the Grand Rapids Store. On December 16, the Union representative orally requested recognition of Wedgwood and Wedgwood said "No, I don't want to hear it (128a-129a). On the same day, the Union wrote a letter to DeYoung confirming the request and Wedgwood's statement (130a) and asked for

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[1] Numbers in parentheses followed by the letter "a" refer to pages of the Joint Appendix which is part of the certified record in this case. All dates are 1964 unless otherwise noted.

a date to prove its majority, discuss the unit, and to start bargaining (G.C. Ex. 3, 270a-271a). DeYoung was requested to call the Union regarding the time and place for the requested meeting. This letter was received by Petitioner on December 18th and the following day Petitioner sought and received legal advice that the unit demanded was inappropriate because it did not include the Holland employees and the gas station employees and did not exclude the confidential employees and the students employed part time on a work training program in cooperation with their high school (232a). Acting on this advice, a letter was sent by Wedgwood to the Union on December 22 in response to the Union's letter of December 16 (G.C. Ex. 4, 271a). Petitioner stated in its letter that it had doubts that the Union represented a majority of its employees and also stated that authorization cards were not accurate indications of the free choice of its employees in light of the circumstances under which some of the cards were obtained. Petitioner also offered to bargain with the Union if they could establish that a majority of an appropriate group of employees in fact wished to be represented by the Union. Petitioner further indicated that a secret election would seem to be a proper method for determining the desires of the employees and offered to cooperate in arranging for such an election if the Union wished.

On December 21, before receiving the Petitioner's letter, the Union petitioned for a representation election (131a, G.C. Ex. 5, 272a-276a) which it later withdrew.

Unfair labor practice charges were filed on January 7, 1965 (22a) alleging that Petitioner's refusal to bargain and the three discharges (and one other involving employee) were unlawful and that Section 8(a)(1) had been violated by certain statements made by Petitioner and by promulgation of a no-solicitation rule.

One employee was discharged on December 9 (168a) and two employees were discharged on December 11 (142a, 207a). Six 8(a)(1) violations occurred between December 8-11. After the Union's original request for recognition on December 16, there was only one violation found by the Board and that was an 8(a)(1) violation consisting of at most a veiled threat (181a).

The Trial Examiner found no violation in the refusal to recognize, no violation with respect to the discharges of three employees and no violation with respect to the alleged no-solicitation rule, but did find certain 8(a)(1) violations and an 8(a)(3) violation in the discharge of one employee (T.X. Dec. 22a-65a).

The Board reversed the Trial Examiner with respect to the refusal to recognize, two of the discharges and the alleged no-solicitation rule. It affirmed the Trial Examiner's decision with respect to the 8(a)(1) violations and the other discharge. It affirmed also the dismissal of charges relating to one employee's termination (Bd. Dec. 3a-22a).

The Court of Appeals for the Sixth Circuit, whose jurisdiction was invoked under 29 U.S.C. §160 (e), found substantial evidence in the record as a whole to support the Board's findings of seven 8(a)(1) violations including the promulgation of an unlawful no-solicitation rule and substantial evidence to support the Board's findings that three employees were discharged because of their Union sentiment and activities.

The Court of Appeals also found that there was no abuse of discretion on the part of the Board in finding that the Grand Rapids employees were an appropriate unit for collective bargaining and that the Union had made a clear and unequivocal bargaining demand for the Grand Rapids store despite the tortuous expansion and extraction of the Unit which occurred thereafter. The Court of Appeals found that the General Counsel had sustained its burden of proving bad faith on part of the employer in violation of Section 8(a)(5) because of the three discharges on December 9 and December 11, because of the six Section 8(a)(1) violations occurring between December 8 and December 11, and because of the one 8(a)(1) violation occurring on December 18.

Finally, the Court of Appeals also found, as did the Board, that Petitioner's refusal to bargain occurred on December 16 and that good faith doubt was to be measured from that date. It held that though an employer is to be granted a reasonable time to investigate the Union's majority after a demand for recognition, the Petitioner waived this right because it responded to the Union's

letter written December 16th rather than to the Union's December 16th oral demand. The Court of Appeals stated that the letter was a second demand and the Petitioner was bound by its rejection of the oral demand. Therefore the Court refused to examine any events that occurred after December 16 on the issue of good faith except for the one 8(a)(1) violation of December 18.

REASONS FOR GRANTING THE WRIT

The decision below that an employer may not refuse recognition of a Union that bases its claim to representative status solely on authorization cards unless it has a good faith doubt as to the alleged majority is in conflict with two Fourth Circuit cases which this Court has consolidated and agreed to hear, i.e., *Food Store Employees Union Local No. 347 v. Gissel Packing Co., Inc.*, 398 F.2d 336 (4th Cir. 1968), *cert. granted*, 393 U.S. 997 (1968) and *NLRB v. Gissel Packing Co., Inc.*, 398 F.2d 336 (4th Cir. 1968), *cert. granted*, 393 U.S. 997 (1968), though in accord with a First Circuit case in which certiorari has also been granted, i.e., *Sinclair Co. v. NLRB*, 397 F.2d 157 (1st Cir. 1968), *cert. granted*, 393 U.S. 997 (1968). In addition to raising the identical question posed in those cases, *supra*, the decision below raises several other substantial issues of far reaching importance which should be settled by this Court.

1. Much has been written and said about the inherent unreliability of authorization cards and whether their use by a Union in attempting to gain recognition as the bargaining representative of a group of employees is sanctioned under the National Labor Relations Act, as amended, E.g. Comment, 75 Yale L.J. 805 (1966). It is indeed questionable whether Congress meant by the Taft-Hartley Amendments of 1947 to the Act to permit or allow any means other than a secret ballot election for the selection of a bargaining representative.[2] This Court found it un-

[2] Labor Management Relations Act (Taft-Hartley Act), 61 Stat.136 (1947), 29 U.S.C. §141, *et seq.*

necessary to resolve this question in the cases of *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944), and *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956). As Petitioner's case presents the identical question which this Court has recently agreed to hear and resolve in the *Gissel* and *Sinclair* cases, and because of the importance of this issue, Petitioner desires to have its views and arguments presented to the Court.

2. More importantly however, the decision of the Court of Appeals raises several other substantial issues which this Court should resolve and which are not raised in the *Gissel* and *Sinclair* cases. The court below held that if a union makes an oral demand for recognition of an employer based solely on authorization cards and is initially refused recognition by the employer who states "No, I don't want to hear it", he has violated Section 8(a)(5) of the Act,[3] and is guilty of a refusal to bargain even though the employer promptly retains legal counsel and then offers to bargain with the Union if it can establish that a majority of an appropriate group of employees in fact wish to be represented by the Union and also offers to cooperate with the Union in arranging for a secret ballot election if desired by the Union. The court's decision that the employer does not have a reasonable time to investigate the Union's alleged majority (and, inferentially, to obtain legal advice) after a demand for recognition is not only erroneous and in conflict with its own decision in *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28, 32, n.2 (6th Cir. 1968), but is also in conflict with the Second, Fourth and Fifth Circuits on this issue. *NLRB v. River Togs, Inc.*, 382 F.2d 198, 206 (2d Cir. 1967); *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 567-568 (4th Cir. 1967); and *NLRB v. Dan River Mills, Inc.*, 274 F.2d 381, 387-388 (5th Cir. 1960).

The court's stated reason for so holding is that Petitioner replied to the Union's letter written on the same day of the oral demand rather than to the oral demand. Such a holding is not only erroneous but is hypertechnical for the court's decision implies that if Petitioner had stated in its letter that it was replying to the Union's oral demand

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[3] 29 U.S.C. §158(a)(5).

and not to its letter confirming that demand written the same day, then Petitioner would be entitled to a reasonable time to investigate the majority status of the Union and to obtain legal advice. We believe that an employer faced with a demand for recognition from a Union claiming majority status based on authorization cards is always entitled to a reasonable time to investigate the alleged majority, to secure legal advice, and also to make its views known to the employees and should not be cast in bad faith "for equivocal spontaneous reactions to a union summons . . .; even if he does not doubt the union's assertion that a majority had signed cards, he is [at the very least] entitled to find out something about the circumstances." *NLRB v. River Togs, Inc., supra* at p. 206. See also *Schwarzenbach-Huber Co. v. NLRB,* ..... F.2d..... (2d. Cir. 1969), 70 LRRM 2805, 2813.

3. Since the court below refused to look at what the employer in fact did after the oral demand for recognition (except for the one 8(a)(1) violation), it avoided the issue raised by Petitioner which was that good faith doubt as to the appropriateness of a bargaining unit is a defense to a refusal to bargain charge regardless of whether Petitioner doubted the majority status of the Union at the time of the demand. Petitioner received legal advice that the unit sought by the Union was inappropriate and this advice was borne out by the subsequent changes in the unit after the Union's initial demand. It was further borne out by the fact that Petitioner's contention that the only appropriate unit was a unit which included employees of both the Grand Rapids and Holland stores was sustained by the Trial Examiner. The Board's reversal of the Trial Examiner's decision and the court's affirmance is at odds with a decision of the Board nearly on all fours factually with Petitioner's case. *Pep Boys,* 172 NLRB No. 23, 68 LRRM 1308 (1968). However, whether or not the court's holding that there was no abuse of discretion on the part of the Board in finding that the Grand Rapids employees were an appropriate unit is correct, we nevertheless believe that an employer's doubts concerning the appropriateness and composition of a bargaining unit are entitled to be resolved in a representation proceeding and

that an employer does not act at his peril in withholding recognition in such a case.

4. Finally, in addition to ignoring what the employer did after the oral demand for recognition as it related to the employer's good faith or lack thereof, the court below held the General Counsel had met its burden of proving bad faith because of three employee discharges and seven 8(a)(1)[4] violations, all of which but one had occurred at the *beginning* of the Union's organizational campaign nearly one week before the demand for recognition was made. This holding is not only questionable but as a matter of logic and common sense is not sustainable for these unfair labor practices obviously did not prevent the acquisition of a claimed majority which the Union asserted it had achieved nearly a week later and could therefore, in no way, be said to have been done in order to gain time in which to dissipate a majority. The court below avoided using that formula phrase which the Board has used so many times in the past beginning with *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), and instead based its decision on the statement that Petitioner's earlier unfair labor practices were a "substantial and sustained effort to thwart Respondent's employees in their efforts to organize its store." *NLRB v. Lou DeYoung's Market Basket, Inc.*, ... F2d ..... (6th Cir. 1969), 70 LRRM 2262, 2268. There is a world of difference between "a desire to prevent the acquisition of majority status as [compared] with a purpose to destroy an existing majority." Lesnick, *Establishment of Bargaining Rights without an NLRB Election*, 65 Mich. L Rev. 851, 855 (1967). "As Judge Learned Hand said in a similar context, his response 'however unlawful in itself it may have been, throws substantially no light on how far he thought the effort had succeeded to form a union. As a penalty it might be proper, but as a link in reasoning it seem to us immaterial.' *NLRB v. James Thompson & Co., supra*, 208 F.2d at 746, 33 LRRM 2205." *NLRB v. River Togs, Inc., supra* at p. 207.

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[4] 29 U.S.C. §158(a)(1).

We do not believe evidence of good faith doubt is negated by an employer's desire to thwart unionization whether by proper or improper means. Clearly, employer opposition to unionization is not only permitted but anticipated by the National Labor Relations Act. Section 8(a)(2)[5] was written with an intention to prevent union-management collusion and Section 8(c)[6] grants an employer protection to express his views against a union. In Petitioner's case, lack of good faith doubt was said to have been established because of the misconduct which had occurred nearly a week before the demand for recognition. An employer's misconduct prior to a refusal to recognize a Union by itself in no way establishes his lack of good faith doubt for it is also his conduct at the time and subsequent to his refusal that is just as important. As noted before, the Court of Appeals refused to consider the employer's conduct subsequent to the refusal except for the 8(a)(1) violations; yet, if good faith doubt is the test which must be met, it would seem that all relevant and material conduct on the part of an employer should be taken into account in determining whether or not an employer has in fact acted in good faith. As noted before, the employer's subsequent conduct was free of any unfair labor practices except one 8(a)(1) violation. Petitioner offered to bargain with the Union and also offered to cooperate with the Union in arranging an election if desired by the Union. The day before the employer's letter was sent to the Union, the Union filed a representation petition seeking an election which it subsequently withdrew thereby preventing the prompt resolution of the unit question and an election.

5. The questions presented by this case are of great and recurring significance in the administration of the National Labor Relations Act, as amended. The important nature of one of these issues has already been recognized by this Court when it granted certiorari in the *Gissel* and *Sinclair* cases. The other questions presented by Petitioner's case are just as important as the question which this court has agreed to hear.

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[5] 29 U.S.C. §158(a)(2).

[6] 29 U.S.C. §158(c).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §§ 141, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization ad-

mits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
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> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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BOARD'S DECISION AND ORDER

LOU DE YOUNG'S MARKET BASKET, INC., Wyoming, Mich. and RETAIL STORE EMPLOYEES UNION, LOCAL NO. 20, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, Case No. 7-CA-4994, June 21, 1966, 159 NLRB No. 54.

* * *

Before McCulloch, Chairman; Fanning and Jenkins, Members.

* * *

On January 21, 1966, Trial Examiner Lloyd Buchanan issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, the Respondent filed exceptions and a brief in support, the General Counsel filed exceptions and a brief in support, and the Respondent filed a brief answering the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the exceptions and briefs, and hereby adopts the Trial Examiner's finding, conclusions and recommendations except as modified.

The following findings of the trial examiner were adopted by the Board:

On December 9, one of the employees, in the presence of others, asked a supervisor whether the company president knew anything about the union. The supervisor replied: "He is on to you guys. He has names and he is going to take steps to stop you."

On December 11, a supervisor stated, in the presence of several employees, that, if he had to, he could run the store with fewer employees if the union came in, and that part-time help would have to be cut out.

On December 18, during a conversation with an employee concerning the union, this supervisor referred to possible discharges and to automation and layoffs in his experience elsewhere, adding that the union would not hurt him, but would hurt the employees.

The union activity had commenced on December 8 and was led by an employee who solicited and obtained signatures on union cards. On December 9, the employer said he was "going to put a stop to this." He thereupon left his office, returned with the union leader, and directed that this employee be given his "time," adding that there were going to be a few changes. After the employee left, the employer stated: "That was just the beginning, there would be more yet."

The employer later attempted to justify this discharge by contending that he needed to reduce staff or that the employee wasted time. Others who admittedly participated with the discharged employee in the alleged "goofing off" were not disciplined. The employee's supervisor said he was a "pretty good man" who the supervisor never criticized for his work. This discharge is found to be unlawful.

Also on December 9, the employer approached an employee whom he suspected of union activity and asked him about reports that he was very unhappy with his job and had other jobs lined up. The employee said this was true and cited one job that looked especially good. The employer then suggested that it might be a good idea to take one of those jobs. The employee agreed, saying that he

would finish the day, which he did. No violation is found in this termination.

[Text] 1. The Trial Examiner found no violation of Section 8(a)(1) of the Act based on supervisor Meinardi's threatening comment on December 8, at the beginning of the Union's organizational campaign, to employees Boosamra and Slagter to the effect that, if president DeYoung came into the back of the store and found one soliciting the other, he would "fire" both of them. Contrary to Board precedent, the Trial Examiner concluded that Boosamra lost his status as an employee because he was off-duty at the time,[1] and he dismissed the incident without further reference to Slagter. The incident occurred in the store's break or back room, with Slagter on his break time and Boosamra having returned to the store after a Union meeting. Clearly a threat by a supervisor is no less coercive when employees are on non-work time.[2]

The Trial Examiner concluded that the record evidence on interrogation was limited to one instance, which was too isolated to justify a finding of violation of Section 8(a)(1) in this respect. The instance he credited occurred on December 8 when vice-president Wedgwood asked employee Dykstra if he was "involved in this union business." The Trial Examiner apparently overlooked the Wassen incident of the next day, December 9, when Wedgwood requested employee Wassen to come with him and asked whether Wassen "was for what the guys were talking about in the back room" and "why" he was for it. Wedg-

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[1] See *Ward Manufacturing, Inc.*, 150 NLRB No. 127 involving the unlawful application of a discriminatory no solicitation rule to an off-duty employee; *Bauer Aluminum Company*, 152 NLRB No. 138, in which Member Jenkins dissented because the off-duty return to the premises was in violation of a printed rule which was fairly enforced in his view.

[2] *Miami Coca-Cola Bottling Company*, 138 NLRB 1209, 1210, enf'd 324 F. 2d 501.

wood was asked no questions about this incident. Additional aspects of it were discussed by the Trial Examiner in another context.[3] We find that the Respondent did, in these Dykstra and Wassen incidents, unlawfully interrogate its employees in violation of Section 8(a)(1) of the Act.

Concerning an incident on December 10 the Trial Examiner found that Wedgwood's admonition to employee Breedlove not to engage in "other activities" on company time—confirmed as meaning union activities when Breedlove, who did not "believe" he was neglecting his work, questioned whether union activities were meant—involved no violation of Section 8(a)(1). Specifically the Trial Examiner found that this incident did not constitute a new or unlawful no-solicitation rule of general applicability, or unlawfully interfere with Breedlove specifically, and amounted only to a restriction on Breedlove's "indicated excess to the neglect of his work". We, on the contrary, find that this December 10 admonition constitutes oral promulgation and enforcement of a discriminatory rule against union solicitation at the height of union activity. The record shows that other solicitations on company time had occurred, for raffles, sports pools, and flower and gift collections, and, as found by the Trial Examiner, that the Respondent was aware of that fact. By selecting Breedlove, a known union adherent, in a context of union organizing, and identifying the thrust of its admonition as *union* activities, we think the Respondent made explicit its anti-union purpose rather than a purpose to protect the proper

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[3] See the second paragraph of the discussion of De Keiver's termination, where the Trial Examiner refers to parts of the Wedgwood-Wassen conversation as a "threat not alleged". Actually the complaint alleges interrogation and threats on December 9 by president DeYoung, whereas the testimony offered by the General Counsel in support was by vice-president Wedgwood. We note that the customary motion to conform the pleadings to the proof, as to names and dates, was granted at the close of hearing.

use of working time.[4] We find, on this record, that the Respondent's rule, in the form of the admonition of Breedlove, was precipitately adopted and enforced to discourage union activities in violation of Section 8(a)(1) of the Act.

2. The Trial Examiner found that the discharges of Breedlove and Albin on the morning of December 11 were not a violation of Section 8(a)(3) of the Act. We disagree with his conclusion. These two employees had the permission of their immediate supervisor to go to Wedgwood's office that morning. When they got there, Wedgwood said: "What can I do for you boys?" Breedlove, the spokesman for the two, said that they were "one hundred per cent for the Union" and felt that they ought to tell Wedgwood that. Wedgwood asked why they were telling him something he already knew and Breedlove repeated his belief that they had a duty to tell him. Wedgwood then said that he had known about unions for 25 years, and they did not have to come in and tell him what they thought of it, he knew all about unions. About this time Wedgwood asked if Albin felt the same way about it; Albin said yes. Wedgwood then ascertained where in the store both were supposed to be working, and sent for DeYoung, to whom he had already reported his warning to Breedlove. In the meantime Wedgwood asked Breedlove whether he remembered their conversation of the night before about ceasing "outside activities" and suggested that Breedlove, by coming to his office, was disregarding his instructions. Breedlove agreed that he was if the conversation in which he

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[4] See *The Wm. H. Block Company*, 152 NLRB No. 30; *Ward Manufacturing, Inc.*, footnote 1 above., The Trial Examiner implies that Wedgwood spoke to Breedlove twice on December 10, whereas Wedgwood's testimony indicates that this occurred only at the end of the day.

[5] The Trial Examiner did not credit Wedgewood's testimony that Breedlove admitted he was defying Wedgewood and intended to keep on doing it, reference to which Wedgwood omitted from his prehearing statement.

was then engaged was union activity.[5] By this time DeYoung had come in, and Wedgwood said to him: "These boys came in to tell us that they are for the Union one hundred per cent." Whether DeYoung made any comment does not appear, but Wedgwood finally threw up his hands and said: "Well, boys, I guess you had better punch out now." Asked how long the whole conversation lasted, Wedgwood said. ". . . I paused a few minutes—I thought a few minutes—and I would say they probably were in there eight or ten minutes."

The incident impressed the Trial Examiner as having the aspect of employee insubordination, particularly in view of his related finding—not adopted by the Board—that the Respondent had promulgated no rule against union solicitation by warning Breedlove not to engage in union activities the day before. But in the circumstances of this case, we, unlike the Trial Examiner, are persuaded that the Respondent's discharge action was motivated by the antiunion animus already displayed by DeYoung and Wedgwood in the very short period during which the organizing campaign had been under way. As we have found, Wedgwood interrogated employees about the Union on December 8 and 9; on December 8 supervisor Meinardi warned employees Boosamra and Slagter, who were off duty, that they would be fired by DeYoung if he found them engaged in union solicitation; the next morning supervisor Dahnke told a group, including Boosamra, that DeYoung was "on to you guys and he has names and is going to take steps to stop you." Later that morning of the 9th, Boosamra was discharged by DeYoung, and DeYoung referred to the incident in the hearing of the office girl by stating "that was just the beginning" and saying that there would be more.[6] That afternoon DeYoung approached DeKeivers, whom he suspected of union activity, and engaged him in a conversation that resulted in

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[6] The record also contains the testimony of dairy manager Papa that before lunch on the 9th DeYoung asked him whether he had seen Breedlove and Albin with Union cards.

DeKeivers' quitting (as found by the Trial Examiner and affirmed by the Board), and still later on the 9th Wedgwood told employee Wassen that "they had let a few go" that afternoon. The following afternoon, Wedgwood, talking with Breedlove, promulgated as to him an invalid no-union solicitation rule despite the fact that the Respondent customarily permitted solicitation for other activities on working time. In this context of vigorous antiunionism we conclude that Wedgwood's discharge of Breedlove and Albin the next morning was in furtherance of the Respondent's effort to stop the union campaign by coercive measures, and not merely because he considered that their brief, excused absence from their work stations and the announcement to him of their union support amounted to insubordination. Their declaration of sympathy and support for the Union, made to Wedgwood at a time when he and DeYoung were intent upon blocking the Union, we find was the real motivation for the discharges, thereby constituting those discharges a violation of Section 8(a)(3).

3. The Trial Examiner dismissed the 8(a)(5) allegation on the ground that *only* a unit of both of the Respondent's stores—one located at Grand Rapids and one located at Holland, Michigan—was appropriate and, as the Union had requested recognition, and had majority support, in a unit limited to the Grand Rapids store, no refusal to bargain had occurred. It was his conclusion that a "totality of the evidence" indicated a "combined operation" of the two stores, with merchandise, employees, and funds treated as one. We do not agree with the Trial Examiner's unit finding based on the evidence here. On the contrary, we conclude, for reasons to be discussed below, that the presumptive appropriateness of a single store unit in the circumstances of this case has not been overcome.

On December 16 Union representative Vander Werff, accompanied by Boosamra and Breedlove who had been discharged by the Respondent the week before, requested recognition of Wedgwood, based on a majority showing "in the store". This presumably meant the Grand Rapids

store where the organizing had occurred. Although not discussed by the Trial Examiner, there is testimony that Vander Werff exhibited a pack of authorization cards, and that Wedgwood said he did not want to listen and would "call the cops" if they did not leave. Later the same day the Union put this request in writing, in a letter to the Respondent, and again offered to prove its majority, in a unit of employees "in the store", with signed authorization cards. It suggested a December 21 meeting date for contract negotiations and also requested the reinstatement of Boosamra, Breedlove, and Albin. Having no response to its letter, the Union on December 21 filed a representation petition with the Board, describing the unit as: "All fulltime and parttime employees and all fulltime and parttime employees of leased departments of the employer's retail store and gas station." The Grand Rapids address of the Respondent appears on the petition. Only the Grand Rapids store has a gas station. On December 22 Wedgwood wrote the Union questioning the Union's majority, but expressing a willingness to bargain if the Union could establish a majority "of an appropriate group of employees", and suggesting that it would cooperate in arranging for such an election. Thus the Respondent did not specifically suggest a two-store unit in its answering letter. The complaint, issued on May 14, alleged the single store unit at Grand Rapids, but was amended before hearing to specifically include five gasoline station attendants, and exclude truckdrivers, of which there are two. The Respondent's answer, filed after the amendment, denied the allegations of the complaint on unit, but stated that the Respondent had refused to bargain because it did not believe the Union had a majority "in an appropriate unit", again without setting forth what it considered an appropriate unit. Its contention that a unit combining the two stores was the only appropriate unit was not made until the hearing.

We find that the Union made a valid request for bargaining in a unit limited to the Grand Rapids store, and that the Union's representation petition and the complaint

as amended were merely clarifications of the original unit request.[7]

The two stores are the only stores operated by the Respondent. They are 22 miles apart. Although accessible by freeway, the driving time is estimated as half an hour. There is no public transportation between the two. The Holland store was purchased by the Respondent 9 months before the Union's December 1964 organizing campaign at the much larger Grand Rapids store.[8]

Different hours are kept at the two stores, Grand Rapids opening 2 hours earlier and closing 2 hours later. A single office located in the Grand Rapids store serves both stores, and President DeYoung and Vice President Wedgwood have their offices there. Wedgwood testified that 95 per cent of his time is spent at the Grand Rapids store and that De Young also spends more time there than at the Holland store. Questioned about his pre-hearing statement to the effect that either he or DeYoung was at Holland "approximately one hour a day", Wedgwood testified that he meant one hour as a minimum. DeYoung, however, testified that he goes to Holland "almost" every day and stays anywhere from an hour to all day. Both Wedgwood and DeYoung testified that at Holland there was no store manager, as such, but that Moss, an admitted

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[7] See *Sabine Vending Co., Inc.*, 147 NLRB 1010, enfd. 335 F.2d 932 (C.A. 5); *Edward Fields, Inc.*, 141 NLRB 1182, 1194-5.

[8] We note a record discussion indicating the size of the employee complement at Grand Rapids and the existence of 45 signed authorization cards which bear the Board's time stamp, including that of alleged discriminatee DeKeivers. As his discharge on December 9 is not found to have been discriminatory, the number of authorization cards is reduced to 44 in a unit of 82 or 83 employees at Grand Rapids, excluding DeKeivers. We find that the Union represented a majority of the employees at Grand Rapids on December 16, 1964.

supervisor, was "in charge of" the Holland store when neither of them was there. As DeYoung put it: "Bob Moss you could probably consider in charge." The following testimony as to Moss's functions ensued:

Q. What were his functions in your absence?

A. To kind of keep his eye on the place and make sure the thing ran good and assign some of the help to what they were supposed to do and see that the groceries got put up and marked properly—generally watch the store.

Q. In other words, he had the day to day supervision of the store?

A. When I wasn't there. In other words, he and I would go over the problems and decide what to do.

Q. You say he assigned employees to work?

A. As they were needed, I would say so.

Q. If an employee were sick, would he give him permission to go home?

A. Yes.

Q. There is no question about his being a supervisor, is there?

A. No, not at all . . .

Q. Was he permitted to discipline employees?

A. We usually discuss things like that, the same as we do in the Grand Rapids store.

Q. And employees were expected to obey his orders?

A. Yes, I think they did.

Q. If an employee refused to obey an order would he be permitted to discharge him?

A. Well, I don't recall that happening. Usually he would have a discussion with me.

Q. He would make a recommendation?

A. I would say so.

Q. How was the hiring handled at the Holland store?

A. There were a few there when we bought the store and I took care of most of that.

Q. What procedure was followed?

A. Well, there was usually an application filled out and left there for me to look at, or someone come

in and ask about it, they would send them in to Grand Rapids to see me, if I don't happen to be there.

Q. Did you interview all of the employees hired for the Holland store?

A. I would say the biggest share of them probably. Let's say yes.

Q. Would Mr. Moss ever interview any of them?

A. He might have interviewed them or talked to them or something to that effect but he usually discussed it with me.

Q. Did he hire any of them?

A. I don't think you can say on his own he hired them, no.

Q. Part time employees?

A. We usually discussed most of that. I was the final say so.

Moss did not testify. From the above we conclude that Moss acted in the capacity of a store manager at Holland in December 1964, when the events in question occurred at Grand Rapids, and that he had substantial authority to carry on the daily operations at Holland. This conclusion as to Moss' authority at Holland is supported by other testimony of DeYoung. Asked if he undertook any day-to-day operations at Holland, DeYoung said: "I would make recommendations . . . I made several recommendations . . ." He further described his own function when at Holland as follows: "Make decisions on where to put things, where to change the aisles around, see if anything had to be done to the property—general management."

On the important question of interchange of employees between Grand Rapids and Holland,[9] the Trial Examiner found that interchange "is and has been common and whenever need exists; and is most significant because it is not noted for payroll purposes." We, on the contrary, would characterize the normal interchange as infrequent, and

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[9] The only temporary transfers from Holland to Grand Rapids were for the purpose of training Holland personnel.

would draw no inference that it becomes significant because it is not recorded for payroll purposes. In this connection we note that Wedgwood testified that Moss' wages were charged to Holland when he was "spending his time there in order to keep our percentage straight over the sales." It is also noted that the Holland store has its own bank account, used exclusively for its deposits and to cover the costs of its own payroll and merchandise. Thus it seems that the Respondent is definitely interested in maintaining cost accounting records for the separate stores, from which—if an inference is to be drawn—it would seem more reasonable to infer that the failure to record temporary transfers for payroll purposes tends to establish, either that the policy of making these transfers as not conceived as permanent, or that the transfers were insufficient in quantity and duration to have substantial cost impact.

Analyzing the actual evidence on interchange, we note that DeYoung, who testified for the General Counsel as an adverse witness, stated that two maintenance men from Grand Rapids did considerable maintenance at Holland, "particularly in the beginning", and "even today" may go there "as much as once a week for some jobs." He spoke of bringing "Grand Rapids help" to rearrange at Holland "quite often . . . two, three, four times a week when we first took it over." He then said that the period of arranging had gone on for "eight or nine months", and, after that, "some" employees go down every week—"maybe once, twice, or three time." Later, asked by his own counsel whether employees identified by him (DeYoung) as regularly interchanged[10] went to Holland every day, every month, or every week, DeYoung said: "Whenever we want to make some changes down there, which was quite often at that time . . . No special schedule but whenever we needed them, we move them down on a moment's notice and whipped the place in shape and came back to town."

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[10] The Respondent called no employees to testify on interchange, although DeYoung had identified about 18 as regularly interchanged.

Wedgwood in his testimony seemed to associate interchange of employees with major changes at Holland, which he characterized as "in constant confusion from the time we bought it. Our business was three or four times what it was in there, and everything was too small and confused, and it was just a revolution."

Witnesses testifying for the General Counsel added specific dimension to the degree of interchange. Mrs. DeHollander, the office employee who schedules work for all Grand Rapids employees other than meat department employees, testified on subpena that she was usually consulted about who could be spared to work at Holland. She also stated: "When the Holland store was first opened, they usually sent the night crew over to stock the shelves and rearrange the store, but since then, since they got the store rearranged, there has been no set pattern, just when some special occasion comes up." Supervisor Dahnke, who left the Respondent's employ in April 1965, estimated the frequency of Grand Rapids employees going to Holland to work as "maybe once every two weeks or once a month." Employees Hazzard and Hildebrandt, among those identified by DeYoung as regularly interchanged, testified on subpena to what can only be described as infrequent occurrences. Hazzard was not employed by the Respondent until May, about 2 months after the Holland store opened, and had been to Holland only twice: in August 1964 and in May 1965, the first time to take inventory and the second time to rearrange the produce department. Hildebrandt, an employee for several years, had been to Holland to work twice when the store opened; he had been there twice after that to help stock the shelves for sales. For sales he was part of a crew of six or seven working about 4 hours. Wassen, who also testified on subpena, had been to Holland "about every day" the week Holland opened, but only twice since: once to stock and once to take inventory. Henry, a part-time employee, had gone to Holland just three or four times "shortly after it opened". We note also that Hazzard, identified as one regularly interchanged, testified that, on both occasions when he worked at Holland, Moss had asked him if he wanted to go. Haz-

zard characterized the opportunity as "a pretty big thing to go out to Holland. We don't do it very often". Asked whether other persons than he had gone to Holland "this year", he said "Yes . . . to pick up papers in the side lot there, in the side yard and do a little stock once in a while. . . . I believe they fixed a pipe by the meat department one time."

Based upon the above testimony, we conclude that once the Holland store had been adapted to the business methods of its new owners, the instances of Grand Rapids employees working at the Holland store were limited and unpredictable. Considering this type of interchange in the context of the geographic separation of the stores,[11] the substantial operating authority of the "man in charge" at the newer, Holland store, the absence of any bargaining history for employees at either store, and the fact that no labor organization seeks a broader unit, we find that a unit limited to the employees at the Grand Rapids store of the Respondent is an appropriate unit for collective bargaining.[12] Accordingly, as the Union had majority representation in that unit on December 16, 1964, when it requested recognition of the Respondent, we find that the Respondent refused to bargain in violation of Section 8(a)(5) when it denied recognition on that date. We also find that the Re-

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[11] Wedgwood conceded that generally employees hired to work in the Holland store are Holland residents or residents of the Holland area. We do not agree with the Trial Examiner that this factor is irrelevant to the unit question, or outweighed by other factors in this case.

[12] See *Sav-On Drugs, Inc.*, 138 NLRB 1032; *Winn Dixie Stores, Inc.*, 143 NLRB 848, 860-1, enfd. 341 F. 2d (C.A. 5); *Merner Lumber and Hardware Co.*, 145 NLRB 1024, 1025-6, enfd. 345 F. 2d 770 (C.A. 9), cert. denied 382 U.S. 942; *Sun Drug Co., Inc.*, 147 NLRB 669, enfd. 359 F. 2d 408 (C.A. 3); *Primrose Super Market of Salem, Inc.*, 148 NLRB 610, 613-17, affirmed without opinion, April 7, 1965 (C.A. 1), cert. denied October 11, 1965, 382 U.S. 830, motion for reconsideration denied December 7, 1965, 353 F. 2d 675 (C.A. 1).

spondent's refusal was not motivated by a good-faith doubt of the Union's majority status inasmuch as there is clear evidence of unlawful efforts, both before and after the refusal, to thwart the employees' union activities and to gain time in which to dissipate that majority.[13]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Lou DeYoung's Market Basket, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Retail Store Employees Union, Local No. 20, Retail Clerks International Association, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees of the Respondent employed at its Grand Rapids store, including all employees in the grocery, meat, and produce departments, cashiers, and employees at its gas station; excluding truckdrivers, professional employees, guards, the store manager, the assistant managers, managerial and confidential employees, and supervisors, as defined in the Act.

(b) Discouraging membership in Retail Store Employees Union, Local 20, Retail Clerks International Association, AFL-CIO, or in any other labor organization, by discriminatorily discharging any of its employees or dis-

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[13] See *Joy Silk Mills, Inc.*, 85 NLRB 1263, affd. 185 F. 2d 732 (C.A.D.C.), cert. denied 341 U.S. 914.

criminating in any other manner in respect to their hire or tenure of employment, or any term or condition of employment.

(c) Indicating surveillance of, interrogating and threatening employees in connection with protected concerted activities, and promulgating rules against union solicitation on company time while permitting other types of solicitation on company time.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Retail Store Employees Union, Local No. 20, Retail Clerks International Association, AFL-CIO, as the exclusive representative of employees at Respondent's store in Grand Rapids, Michigan, in the unit found appropriate above, and embody any understanding reached in a signed agreement.

(b) Offer to John Boosamra, James R. Breedlove, and John Albin immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay, together with interest thereon at 6 per cent per annum, in accordance with *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716; and notify them, if they are presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Grand Rapids, Michigan, copies of the attached notice marked "Appendix".[14] Copies of said notice, to be furnished by the Regional Director for Region 7, shall, after being duly signed by the Company's representative, be posted by the Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 10 days from the receipt of this Order, what steps have been taken to comply herewith.

IT IS HEREBY ORDERED that the complaint be dismissed insofar as it alleges the discriminatory discharge of Bernie DeKeivers.

Dated, Washington, D. C. June 21, 1966.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member
(Seal) National Labor Relations Board

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

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[14] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order".

WE WILL NOT refuse to bargain with RETAIL STORE EMPLOYEES UNION, LOCAL NO. 20, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, as the exclusive representative of our employees in the following appropriate unit:

> All full-time and regular part-time employees of Respondent employed at its Grand Rapids store, including all employees in the grocery, meat and produce departments, cashiers, and employees at its gas station; excluding truckdrivers, professional employees, guards, the store manager, the assistant managers, managerial and confidential employees, and supervisors as defined in the Act.

WE WILL NOT indicate surveillance of, interrogate, or threaten employees in connection with protected concerted activities, or promulgate rules against union solicitation on company time while permitting other types of solicitation on company time.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist RETAIL STORE EMPLOYEES UNION, LOCAL NO. 20, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL offer to John Boosamra, James R. Breedlove, and John Albin immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any

loss suffered as a result of the discrimination against them.

All of our employees are free to become, remain, or to refrain from becoming or remaining, members of RETAIL STORE EMPLOYEES UNION, LOCAL NO. 20, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, or any other labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

Lou De Young's Market Basket, Inc.
(Employer)

Dated ..... by .....
(Representative) (Title)

NOTE: In the event that John Boosamra, James R. Breedlove, or John Albin are presently serving in the Armed Forces of the United States, we will notify them of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226 (Tel. No. 226-3244).

SIXTH CIRCUIT'S DECISION
(Filed January 17, 1969)

No. 18160

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOU DE YOUNG'S MARKET BASKET, INC.,
Respondent.

ON PETITION for Enforcement of an Order of the National Labor Relations Board

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Decided January 17, 1969

Before: PHILLIPS, EDWARDS and CELEBREZZE, Circuit Judges.

CELEBREZZE, Circuit Judge. Pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 151, et seq., the Board seeks enforcement of its order of June 21, 1966, directing Respondent Lou De Young's Market Basket, Inc., to bargain with Local 20, Retail Clerks International Association, AFL-CIO on request as the exclusive representative of the employees of Respondent's Grand Rapids, Michigan store. In addition to the bargaining order, the Board directed Respondent to cease and desist from certain unfair

labor practices in violation of Section 8(a)(1) of the Act; to reinstate with back pay three employees discharged in violation of Section 8(a)(3) and (1) of the Act; and to post the usual notices. Jurisdiction is admitted.[1]

Respondent is a Michigan corporation. Its sole stockholders, De Young and Wedgwood, manage the Grand Rapids store and another store that Respondent owns in Holland, Michigan. The Union, which began its organizational campaign on December 8, 1964, limited all of its efforts to the Grand Rapids store and successfully obtained valid authorization cards from a majority of that store's employees. When Respondent refused to recognize it, the Union filed unfair labor practice charges. The Board based its order on these events:

On December 7, 1964, Union representative Vander Werff gave employee Wassen several Union authorization cards. Wassen divided them among some other employees, including Breedlove and Boosamra. On December 8th, Boosamra procured about ten signatures, obtained additional cards, and returned to the store to solicit more signatures. On the same day, Wedgwood and De Young began an antiunion campaign consisting of threats, surveillance, and interrogation. The Board found that this conduct violated Section 8(a)(1) of the Act.[2] Although Respondent does not seriously disagree with these findings, it challenges the Board's conclusion that these violations were substantial, preferring instead to characterize them as slight or "technical" infractions. This contention will be dealt with more fully in connection with our discussion of the Board's bargaining order. Finding substantial evidence in the

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[1] The Board's decision is reported at 159 N.L.R.B. 954 (1966).

[2] Between December 8th, the start of the Union's campaign, and December 16th, the date fixed by the Board for Respondent's unlawful refusal to bargain, the Board found six Section 8(a)(1) violations, including the promulgation of an unlawful no-union solicitation rule. This figure does not include the discharges of three employees which are also violations of Section 8(a)(1) of the Act.

record as a whole to support the Board's findings as to the foregoing violations, we grant enforcement of the Board's order respecting them.

BOOSAMRA'S DISCHARGE:

On December 9th, while Boosamra was talking with two other employees, De Young walked in and summoned him to the loading dock in the rear of the store. De Young told Boosamra that he was out of a job and handed Boosamra's time card to an office employee with instructions to write out his check. After telling Boosamra to leave by a side door, De Young exclaimed, "that was just the beginning and there would be more."

Respondent urges that Boosamra was discharged for cause related to economic reasons. business had fallen off considerably and Respondent was taking corresponding steps to reduce its labor costs. Since Boosamra had been warned in the past about "goofing off", his discharge was essentially "just the beginning" of Respondent's attempt to align its labor force with the economic realities facing it.

Respondent's contention, however, is not borne out by the record. During the unfair labor practice hearing the following colloquy took place between the Board's counsel and De Young:

> "Q. Now, Mr. DeYoung, you testified, as I recall that as a result of business slump your employment complement was away out of line with the volume of business you were doing, is that correct? A. Yes.
>
> "Q. And consequently you were in the process of cutting back the number of employees. Is that correct? A. Yes.
>
> "Q. But this had nothing to do with the discharge of Boosamra, is that your testimony? A. I fired Boosamra.
>
> "Trial Examiner: I beg your pardon?
>
> "The Witness: Boosamra was discharged for his activities."

The Trial Examiner concluded that Boosamra's unsatisfactory activities," were his support for the Union and that this prompted his discharge by Respondent in violation of Section 8(a)(3) of the Act. The Board agreed and ordered Boosamra's reinstatement with back pay. We enforce the Board's order.

BREEDLOVE AND ALBIN'S DISCHARGES:

On December 10th, Breedlove solicited employees during working hours. He was observed by Wedgwood. As Breedlove prepared to leave for the day, Wedgwood approached him and warned Breedlove that he was neglecting his work and not to spend working time on "outside activities." Breedlove asked if Wedgwood meant union activities, and if this was an ultimatum. Wedgwood gave affirmative answers to both questions.

The next day, Breedlove and Albin asked their supervisor if they could see Wedgwood. They entered Wedgwood's office together and Wedgwood asked what they wanted. Breedlove replied that he and Albin were "100 per cent for the Union." Wedgwood asked why they were telling him something he already knew; Breedlove said that he felt it was his duty. Wedgwood asked Albin if he felt the same way; Albin said he did. Wedgwood then reminded Breedlove about the warning he had given him. At this point De Young walked in, he and Wedgwood exchanged glances, and Wedgwood, "threw up his hands" and told Breedlove and Albin to "go punch out."

The Trial Examiner found no violation of Section 8(a)(3) of the Act in Respondent's discharge of Breedlove and Albin: "I find that it was the extent of Breedlove's activity when he should have been working, not . . . [his] support of the Union which prompted the discharge." The Board, however, disagreed:

> "In this context of vigorous antiunionism we conclude that Wedgwood's discharge of Breedlove and Albin . . . was in furtherance of the Respondent's effort to stop the union campaign by coercive measures, and not merely because he considered that their brief, excused absence from their work stations and the an-

> nouncement to him of their union support amounted to insubordination. Their declaration of sympathy and support for the Union, made to Wedgwood at a time when he and De Young were intent upon blocking the Union, we find was the real motivation for the discharges, thereby constituting those discharges a violation of Section 8(a)(3)."

The "context" of Breedlove and Albin's discharges, according to the Board, consisted of Respondent's numerous unfair labor practices — the threats, interrogations, and surveillance; Boosamra's unlawful discharge; and a further finding that Wedgwood's ultimatum to Breedlove was an invalid no-union solicitation rule.

Respondent urges, on the other hand, that Breedlove and Albin were fired for neglect of work — "for a particularly brazen and provocative neglect of duties done in the face of a specific warning against it."

Neglect of work is of course good cause for discharge, and a context of vigorous antiunionism does not transmute such neglect into protected activity. Yet if Wedgwood's aim in discharging Breedlove and Albin was to strike at the Union, the discharges would be unlawful even if Wedgwood had cause to discharge them. *N.L.R.B. v. Challenge Cook Bros.*, 374 F.2d 147 (6th Cir. 1967); *N.L.R.B. v. Mid-West Towel & Linen Service, Inc.*, 339 F.2d 958 (7th Cir. 1964). The Board, not the courts, has the delicate task of divining an employer's motives from the confusion generated when spirited organizational activity clashes with comparable efforts to eliminate it. *N.L.R.B. v. Bersted Mfg. Co.*, 124 F.2d 409 (6th Cir. 1942). Consequently, we must defer to the Board's construction of Wedgwood's motives if there is substantial evidence in the record as a whole to support that construction. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 171 S.Ct. 456, 95 L.Ed. 456 (1950); *N.L.R.B. v. Power Equipment Co.*, 313 F.2d 438 (6th Cir. 1963). The fact that the Trial Examiner disagreed with the Board's conclusion does not alter our search for substantial evidence since the Board may, without consequence, reject the recommendations of its Trial Examiners. *Universal Camera Corp.*, supra; *Joy Silk*

Mills v. N.L.R.B., 185 F.2d 732 (D.C. Cir. 1950) cert. denied, 341 U.S. 914.

Wedgwood's warning of December 10th to Breedlove was, as the Board concluded, an invalid rule against union solicitation and a violation of Section 8(a)(1) of the Act. Its invalidity rested on the fact that other kinds of solicitation flourished during working hours.[3] Although an employer may lawfully restrict solicitation on working time, he cannot discriminate against union solicitation. See *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 976; *TRW, Inc. v. N.L.R.B.*, 393 F.2d 771 (6th Cir. 1968) Wedgwood's warning, insofar as it amounted to an unfair labor practice, indicates Respondent's improper motive in discharging Breedlove. *N.L.R.B. v. Bersted*, 124 F.2d 409 (6th Cir. 1942).

In further support of the Board's conclusion that Respondent discharged Breedlove and Albin for their union sentiment is the fact that Albin had never been warned. Since Wedgwood discharged Breedlove and Albin as one, the Board could rightly conclude that their simultaneous declaration of union support, made in the context of Respondent's antiunion activity and at a time when union activities were on Wedgwood's mind, triggered the discharges. See *TRW, Inc. v. N.L.R.B.*, 393 F.2d 771 (6th Cir. 1968). "[N]either the Board nor the courts can read the minds of men." *Joy Silk Mills v. N.L.R.B.*, 195 F.2d 732 (D.C. Cir. 1950), cert. denied, 341 U.S. 914. We feel, nonetheless, that the Board's interpretation is reasonable on the whole record. We therefore enforce the Board's order as it relates to the reinstatement of Albin and Breedlove.

THE REFUSAL TO BARGAIN:

The Board, reversing the Trial Examiner, determined that Respondent had violated Section 8(a)(5) of the Act

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[3] Sports pools, raffles, and gift collections, with management approval, took place periodically. At Christmas employees would collect money for gifts for Wedgwood and De Young.

by refusing to bargain with the Union as exclusive representative of the employees of the Grand Rapids store. The events leading to the Board's order are best illuminated by Union Representative Vander Werff's credited testimony about a meeting of December 16th between he and Wedgwood near Wedgwood's office at the rear of the Grand Rapids store. Vander Werff testified as follows:

> "* * * I asked Mr. Wedgwood if he had a few minutes or seconds, and he said no. * * * I asked him if he had an answer yet with regard to Breedlove and Albin and Boosamra. He said no comment and I said then at this time I would like to inform you that as representative of the retail store employees union local No. 20 we represent a majority of your employees, have them signed on cards which I took out of my pocket and showed him and said we would like to set down [sic] and negotiate wages, hours and working conditions and we are willing to prove our majority.
>
> * * *
>
> "Q. Do you recall having said anything else at this time? A. Yes. When I mentioned it to him, when I stated the last phrase, we represented a majority of the employees of this store, that comes back to me.
>
> "Q. Did you show him the cards? A. I showed him the cards, yes.
>
> "Q. In what manner did you show him the cards? A. I took them out of my pocket and attempted to spread them out in his presence. They were in a stack and I attempted to fan them out.
>
> * * * He said no I don't want to hear it. Threw his hands over his head and above his head, by his head, and ran to his back office.
>
> "Q. Now when he did this, what did you do? A. I followed him to the back office and put my foot in the door, preventing him from closing it.
>
> "Q. Did he attempt to close the door? A. Yes, he attempted to close it and kicked at me, and told me —

"Trial Examiner: What? Kicked at you?

"The Witness: Kicked at me.

"Q. Kicked at what part of you?

"A. My foot.

"Q. Your foot was in the door? A. My foot was in the door and he was kicking at it trying to force me to pull my foot out of the door.

"Q. Did you say anything while this was going on?

"A. Yes, I said I am a representative of the retail store employees union local 20 and we represent a majority of employees and have them signed on cards and we are willing to prove this and we want you to set down [sic] and negotiate for wages, hours and working conditions of the employees in this store. He said to me get out, I will call the cops. I waved the cards in front of him once again and showed them to him in a stack and fanned them out a little bit and then I pulled my foot out of the door and left."

On the same day, the Union wrote to Respondent confirming what took place earlier, and offering again to prove its majority status. Respondent apparently received this letter on December 18th. On December 16th, after his encounter with Vander Werff, Wedgwood told employee Wassen that employees would be laid off if the Union came in and that the Union would not be able to make him negotiate a contract. The Board found that Wedgwood's statement violated Section 8(a)(1) of the Act.

On December 21st, after conferring with counsel, Respondent, in a letter signed by Wedgwood, replied to the Union's letter of December 16th. Respondent refused recognition, stating that it doubted the Union's majority because of certain information it had regarding the circumstances under which the authorization cards were obtained, but that it would bargain with the Union after an election was held to determine if "a majority of an appropriate group of employees in fact wish to be represented by you."

The threshhold question in determining whether Respondent's refusal to bargain violated Section 8(a)(5) of the Act is whether its Grand Rapids store was, as the Board concluded, an "appropriate unit" for collective bargaining purposes within the meaning of Section 9(b) of the Act. Respondent contends that the Holland store employees must be included in the unit. If Respondent is correct in its contention, insofar as all organizational activity was confined to the Grand Rapids store, the Union did not have cards signed by a majority of employees in an appropriate unit when Vander Werff demanded on December 16th that Wedgwood bargain with it.

Section 9(b) of the Act vests wide discretion in the Board to determine the unit appropriate for collective bargaining purposes. See *e.g., N.L.R.B. v. Dewey Portland Cement Co.*, 336 F.2d 117 (10th Cir. 1964). The unit must be one that will "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." Section 9(b), National Labor Relations Act. Courts must defer to the Board's expertise in carrying out this intent of Congress. *Packard Motor Car Co. v. Labor Board*, 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947). In so doing, we will disturb unit determinations only if they are unreasonable, that is, arbitrary and capricious. *N.L.R.B. v. Merner Lumber & Hardware Co.*, 345 F.2d 770 (9th Cir. 1965); *N.L.R.B. v. Sun Drug Co.*, 359 F.2d 408 (3d Cir. 1960). Obviously, there may be more than one unit that will guarantee employees a full measure of freedom to exercise the right to self-organization secured to them by Section 7 of the Act. A corollary to this is that the Board does not act at its peril, to be later overturned on review by a Court of Appeals, if it acts reasonably. *Packard Motor Car Co. v. Labor Board*, 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947); *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir. 1965), cert. denied 382 U.S. 830.

Under some circumstances, a unit embracing a single store of an employer chain will be appropriate for bargaining purposes. See *N.L.R.B. v. Sun Drug Co.*, 359 F.2d 408 (3d Cir. 1966) and cases cited therein. Under other circumstances, however, such a unit may not be appropriate.

See, *e.g., N.L.R.B. v. Purity Food Stores, Inc.*, 376 F.2d 497 (1st Cir. 1967), cert. denied, 389 U.S. 959. The Board must look to the facts in each case and articulate its reasons for concluding that the unit designated by it is appropriate. *Purity Foods*, supra.

In the instant case, the Board determined that a unit limited to employees of Respondent's Grand Rapids store was appropriate because, from the viewpoint of Respondent's employees, the two stores were separate entities. The Board specifically found that each store had its own group of employees and, as of December 16th when the Union demanded recognition, its own man in charge. Of great significance to the Board was the fact that once the Holland store had been adapted to the business methods of its new owners, employee interchange between the two stores was "limited and unpredictable."[4] Compare, *N.L.R.B. v. Purity Foods, Inc.*, 376 F.2d 497 (1st Cir. 1967), cert. denied, 389 U.S. 959, (single unit inappropriate, much interchange) with *Banco Credito y Ahorro Ponceno v. N.L.R.B.*, 390 F.2d 110 (1st Cir. 1968) (single unit appropriate, little interchange); see, *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir. 1965), cert. denied 382 U.S. 830. These findings, along with a geographical distance of twenty-two miles between the stores, buttress the Board's conclusion that the employees of Respondent's Grand Rapids store were an appropriate group for collective bargaining purposes. *Winn-Dixie Stores, Inc.*, supra. Thus, the Board's determination does not "leave some employees under union rules and others working beside them [on their own]:" *Purity Foods*, supra, at 501.

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[4] Respondent purchased the Holland store about nine months before the Union's organizing campaign began in Grand Rapids. When the smaller Holland store was first opened, Grand Rapids employees helped set up the displays and inventory goods. After the Holland store was operating, Grand Rapids employees were sent to Holland sporadically "to pick up papers on the side" or "to do a little stock once in a while." Grand Rapids employees characterized it as "a pretty big thing" to go to Holland; Holland employees, however, were never sent to Grand Rapids.

The Board relied on additional factors in reaching its determination, namely, the absence of any bargaining history for employees of either store and the fact that no employees sought a broader bargaining unit. Although extent of union organization cannot control the scope of a unit, it may serve as a criterion in shaping it. *Labor Board v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 85 S.Ct. 1061, 13 L.Ed.2 951 (1965). We find no abuse of discretion on the part of the Board in designating the Grand Rapids employees as an appropriate unit for collective bargaining.

Before an employer will be directed to bargain on the strength of authorization cards alone, the Union must show that it made a clear and unequivocal bargaining demand, *N.L.R.B. v. Richman Bros., Inc.*, 387 F.2d 809 (7th Cir. 1967), and that the employer lacked a good faith doubt concerning the Union's majority status when it denied recognition. *N.L.R.B. v. H & H Plastics, Mfg. Co.*, 389 F. 2d 678 (6th Cir. 1968); *Pizza Products Corp. v. N.L.R.B.*, 369 F.2d 431 (6th Cir. 1966); *Furr's, Inc. v. N.L.R.B.*, 381 F.2d 562 (10th Cir. 1967), cert. denied, 391 U.S. 840. Here, as elsewhere, good faith or honesty yields rewards, namely, a representation election in which all bona fide doubts of an employer may be settled.[5] *Pulley v. N.L.R.B.*, 395 F.2d 870 (6th Cir. 1968); *N.L.R.B. v. Jackson Press, Inc.*, 201 F.2d 541 (7th Cir. 1953).

The first issue is quickly disposed of. When Vander Werff approached Wedgwood on December 16th, he carried cards signed by a majority of employees in the Grand Rapids store. His demand that Respondent bargain with the Union as representative of the employees "in this store" was not only clear and forceful, but unequivocal as

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[5] Although this Court has said a number of times that it is "strong medicine" to base a recognition and bargaining order on the strength of authorization cards alone, see, *e.g. Lane Drug Co. v. N.L.R.B.*, 391 F.2d 812 (6th Cir. 1968), we do not hesitate to enforce such an order in the absence of good faith dealings on the part of an employer. *Atlas Engine Works, Inc. v. N.L.R.B.*, 396 F.2d 775 (6th Cir. 1968).

to which store Vander Werff meant. "This store" did not mean the Holland store, or the two stores together; it clearly meant the Grand Rapids store alone.[6] *Cf. Lane Drug Co. v. N.L.R.B.*, 391 F.2d 812 (6th Cir. 1968). We next consider what, if any, good faith doubt Respondent had on December 16th as to the Union's majority.

Prior to December 16th, employee Ortega told De Young and Wedgwood that pressure had been put upon employees to sign authorization cards. The Trial Examiner, however, dismissed Ortega's testimony as insubstantial since neither Wedgwood nor De Young expressed any interest in what Ortega told them. The Board concluded that Respondent's unfair labor practices — before and after the bargaining demand — indicated Respondent's lack of good faith. In the Board's view, Respondent had completely rejected the principle of collective bargaining and was attempting to gain time to dissipate the Union's majority.

We believe that the General Counsel has met his burden of proving Respondent's bad faith. *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967); *Lane Drug Co. v. N.L.R.B.*, 391 F.2d 812 (6th Cir. 1968). Violations of Section 8(a)(1) of the Act may indicate that an employer's assertions of good faith doubt are spurious, *N.L.R.B. v. Austin Powder Co.*, 350 F.2d 973 (6th Cir. 1965), especially where such violations are of the "flagrantly coercive" type, or where an employer continues to commit unfair labor practices after

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[6] We agree with the Board that Respondent's refusal to bargain occurred on December 16th and whatever good faith doubt Respondent had must be measured from that date. Once a request for recognition and demand to bargain are made an employer is to be granted a reasonable time to investigate the union's majority claim. *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967). Respondent, however, chose to ignore Vander Werff's oral demand, replying instead to the Union's letter which it received two days later. The letter, however, was a *second* demand that Respondent recognize and bargain with the Union. Since the Union need only ask once, Respondent is bound by its rejection of Vander Werff's earlier demand.

a bargaining demand has been made. *N.L.R.B. v. Ben Duthler, Inc.*, 394 F.2d 28 (6th Cir. 1968).

In the instant case, there were several 8(a)(1) violations, including Wedgwood's threat after the Union's demand of December 16th to lay off employees and not deal with the Union. Also among Respondent's unfair labor practices were its discharges of Boosamra, Breedlove, and Albin. See *N.L.R.B. v. Ben Duthler, Inc.*, supra. We disagree with Respondent's assertion that such unfair labor practices were merely technical violations of the act, preferring instead to characterize Respondent's conduct from the inception of the Union's campaign as a substantial and sustained effort to thwart Respondent's employees in their efforts to organize its store.

Enforcement of the Board's order is granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBEK OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case insofar as it denied enforcement to part of the Board's remedial order.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–19a) is reported at 404 F. 2d 105. The decision and order of the Board (App. C, *infra*, pp. 29a–79a), are reported at 165 NLRB No. 51.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 20a–26a), was entered on December 19, 1968.

The Board's timely petition for rehearing *en banc* was denied on January 16, 1969 (App. B, *infra*, pp. 27a–28a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that an order directing an employer to bargain with the union selected by a majority of its employees was an inappropriate remedy although the court acknowledged that there was an unlawful refusal to bargain and other unfair labor practices that had dissipated the union's support.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 8(a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative

action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

STATEMENT

The court of appeals, on review, accepted the Board's view of the factual setting of this case. It also sustained the Board's unfair labor practice findings. It disagreed, however, regarding the appropriate remedy, and this question of remedy is the sole subject of this petition. It is important, however, to state in some detail the findings which set the context for the Board's remedial determination.

A. THE FACTUAL SETTING

Pembek Oil Corporation sells fuel oil and installs and services oil burners (App. C, *infra*, p. 33a). For some time prior to August 1966, the Company's non-clerical employees had been dissatisfied with their working conditions. Accordingly, when Carl Collins, a known union member, was hired that month, his fellow workers asked him to put them in touch with a union representative (App. C, *infra*, pp. 38a–39a, 44a; Tr. 160, 245–246).[1] Collins phoned James Galullo, Business Agent of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 677; Galullo provided literature and authorization cards which Collins distributed (App. C, *infra*, p. 39a; Tr. 163–165).

[1] "Tr." refers to the transcript of the testimony at the Board hearing; "G.C. Exh." and "R. Exh." refer to the exhibits introduced at the hearing.

By September 8, nine of the 15 non-clerical employees had signed union authorization cards (App. C, *infra*, p. 39a);[2] the next day, the Union wrote the Company (App. C, *infra*, pp. 39a–40a; G.C. Exh. 2):

> Teamsters Local Union No. 677, hereby notifies you that a majority of your truck drivers, oil burner servicemen and installers, mechanics, and helpers have authorized our Union to act as their collective bargaining representative for the purpose of negotiating a labor contract covering their wages, rates of pay, hours of work, and other working conditions.
>
> I suggest that the first negotiating session be held during the week beginning Sunday, September 11, 1966, at a time which is convenient.

When Pembek's President, Fred Knell, received the Union's letter, he retained an attorney (Tr. 385–386), and the next day the attorney wrote the Union (App. C, *infra*, pp. 40a–41a; Tr. 386, G.C. Exh. 6):

> * * * The Pembek Oil Corporation disputes your claim that a majority of the truck drivers, oil burner servicemen and installers, mechanics, and helpers employed by that Company have authorized you to act as their bargaining representative.
>
> In addition, the Pembek Oil Corporation disputes the appropriateness of the unit.
>
> The Pembek Oil Corporation will recognize you only if you are certified as the bargaining agent as a result of an election conducted by the National Labor Relations Board. The

[2] In relevant part, each card stated that the signer authorized the Union "to represent me for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" (App. C, *infra*, p. 42a).

> Company has received a copy of a petition filed by you with the Board, known as Case No. 1-RC-9178. [3]
>
> It is the Company's opinion and position that any cards signed by any of its employees were cards signed solely for the purpose of obtaining a representation election conducted by the National Labor Relations Board and, if not for that purpose, were signed based upon misrepresentations by representatives of your Union as to the import of these cards.

Several hours after the Company received the Union's letter, union activist Collins was discharged, ostensibly because he had "made too many mistakes in computing the price of fuel oil" (App. C, *infra*, p. 44a; Tr. 175, 421–422). The following evening, Collins and about nine other employees met with Union Representative Galullo at the Union headquarters (App. C, *infra*, p. 48a; Tr. 101–102, 113). They discussed the discharge and submitted a series of proposals regarding conditions of employment which they wanted the Union to discuss with the Company; a tenth employee submitted a signed authorization card at that time (App. C, *infra*, pp. 48a–49a, 41a; Tr. 102–105, 114–117, 164–165). Galullo outlined measures which might be taken, including a strike, to procure Collins' reinstatement and a contract (App. C, *infra*, pp. 48a–49a; Tr. 103–105). The employees decided to go on strike the next day for those purposes (App. C, *infra*, p. 49a; Tr. 150, 240–241, 322–324).

[3] The Union had filed a representation petition with the Board on September 12; it was later withdrawn (App. C, *infra*, p. 40a; Tr. 101).

On September 14, most of the employees who had attended the previous night's meeting picketed the Company's premises App. C, *infra*, p. 49a; Tr. 121, 307–309). Union and Company representatives met with Federal and State mediators, but the Company again rejected the Union's request for recognition, asserting that the unit was inappropriate (App. C, *infra*, p. 41a; 144–147, 425). Early the next morning, the strikers decided to return to work, apparently because two of the Company's servicemen, members of another union, did not honor the picket line (App. C, *infra*, p. 49a; Tr. 220–221, 234–235, 324). Employee Carlson telephoned Pembek's Secretary, John Grant, to ask whether they "could come in and sit down and talk," and Grant agreed to a meeting between the employees and President Knell, a supervisory employee and Grant (App. C, *infra*, p. 49a; Tr. 221–222, 235, 427–428).

At the meeting, Carlson explained that the employees were there to discuss their "gripes." Knell said that he "had no idea things had gotten as bad as they were," that maybe "this was a good thing that it did come out," and that "we could straighten something out by having this get together" (App. C, *infra*, p. 50a; Tr. 222–223, 271, 428). The employees asked for a pension plan, and for a posted pay scale. In addition, they spoke of sick and holiday pay (App. C, *infra*, p. 50a; Tr. 271–272, 429). The Company representatives indicated that they had already made inquiries of several insurance companies about pensions; Grant added that sick pay benefits would not be

granted where absence from employment was due to sickness of a member of the employee's family. (App. C, *infra*, p. 49a; Tr. 272, 429.) The parties agreed to meet again during the following week, and the employees retired to "the back shop" to prepare proposals (App. C, *infra*, p. 51a; Tr. 223–224, 273, 439).

Before the meeting had started, Knell had tried to telephone the Company's attorney for advice as to what the Company ought to do under the circumstances (App. C, *infra*, p. 50a; Tr. 389). Counsel, away at the time, returned the call while the employees were working on prospective proposals in the back shop. He forbade further meetings with the employees because, as Knell put it, "having signed the cards, they are considered members of the Union, and until this thing is settled one way or the other, you cannot bargain with them no how." (App. C, *infra*, p. 51a; Tr. 389–390.) Grant and Knell immediately told the employees that upon the advice of counsel they would not meet with them again. The employees pressed for the reason and Grant explained that the Company's attorney "has informed us that you have signed cards, and you are automatically represented by the Union," and added that they were now Union members (App. C, *infra*, p. 51a; Tr. 429, 225, 389–390).

Later that day, the employees decided that they no longer wanted the Union to represent them (App. C, *infra*, p. 51a; Tr. 227–229). Employee Emery phoned Union Agent Galullo and told him that the workers "wanted out," and "didn't want anything to do with

the Teamsters Union because they believed they were misled into it" and "didn't want it to represent" them (App. C, *infra*, p. 51a; Tr. 269, 122–123). The employees, except Collins, then engaged a lawyer. On October 10, the employees' lawyer sent the Union formal notices, dated October 5 and signed by each employee except Collins, advising that the employees were rescinding the authorization previously given the Union to represent them (App. C, *infra*, pp. 51a–52a; Tr. 134–136, 233, R. Exh. 7a–j).

B. THE UNFAIR LABOR PRACTICE FINDINGS

In this context, the Board made the following findings, all of which were sustained by the court of appeals: The Company had discharged Collins because of his union activity, in violation of Sections 8(a)(3) and (1) of the Act (App. C, *infra*, pp. 52a–56a). By dealing directly with its employees and leading them to expect that it would improve their conditions of employment but for their union membership, the Company had caused them to repudiate the Union in further violation of Section 8(a)(1) (App. C, *infra*, pp. 59a–60a). Finally, when the Union requested recognition, it possessed valid authorization cards from a majority of employees in an appropriate unit[4]; and, as shown by its Section 8(a)(3) and (1) violations, the Company's refusal to bargain with the Union was not made in good faith because of any doubt about its majority status, and therefore violated the Com-

[4] The Examiner invalidated the card of employee Emery, but this still left the Union with a majority (App. C, *infra*, p. 68a).

pany's obligation to bargain with the Union under Sections 8(a)(5) and (1) (App. C, *infra*, pp. 65a–70a).

C. THE REMEDIAL ORDER

On the basis of the foregoing findings, the Board ordered the Company to cease and desist from the unfair labor practices found; to reinstate Collins with back pay; and to bargain with the Union upon its request (App. C, *infra*, pp. 74a–76a). The court of appeals, sustaining all of the Board's findings, agreed that the remedies ordered for the Section 8(a) (1) and (3) violations were appropriate, and ordered them enforced (App. A, *infra*, pp. 10a–13a). However, a majority, Judge Hays dissenting, refused to enforce the Board's remedy for the Section 8(a)(5) violation. Despite the findings that there was an obligation to bargain which had not been respected and that the repudiation of the Union had been caused by the employer's unfair labor practices, the majority expressed "considerable doubt as to the employees' continued desire to be represented by the Union" (App. A, *infra*, p. 16a). Because of this doubt and its own feeling that "there has been no such display of flagrant hostility as would suggest that a future election would not actually reflect the desires of the employees," (*id.* at 14a), it concluded that "the Board should have permitted the bargaining representative to be determined by an election held within a reasonable time. A bargaining order in this case would be excessively strong medicine for the ailment and unfair not only to the employer but to the employees as well" (*id.* at 16a).

REASONS FOR GRANTING THE WRIT

1. The issue presented in this case is implicit in several cases recently argued and submitted to this Court, *National Labor Relations Board* v. *Gissel Packing Co., Heck's Inc., General Steel Products, Inc., et al.*; *Food Store Employees Union* v. *Gissell Packing Co. et al.*; and *The Sinclair Co.* v. *National Labor Relations Board,* Nos. 573, 691, 585, this Term. In those cases, the issue is primarily whether the Board may find an unlawful refusal to bargain when an employer declines to recognize and deal with a union holding valid authorization cards from a majority of an appropriate unit of its employees, and also engages in substantial unfair labor practices. But if there were indeed violations of Section 8(a)(5) in those cases, this Court will have to consider further whether bargaining orders were appropriate remedies. In two of the submitted cases, *Sinclair* and *General Steel Products,* the remedy issue is very similar to that in the instant case; there, elections held under the cloud of unfair labor practices showed that the unions' strength had been dissipated, and the employers claim that the absence of a union majority—without regard to its cause—makes a bargaining order inappropriate as a remedy.

As shown in our submissions in those cases, this Court has clearly endorsed use of the bargaining order remedy where an employer's unfair labor practices have dissipated a union's majority. Thus, in *Medo Photo Supply Corp* v. *National Labor Relations Board,* 321 U.S. 678, a majority of employees desig-

nated a union as their representative, and the employer agreed to bargain with it. The employees then offered to abandon the union if their wages were raised. The employer agreed to the wage increase, the employees withdrew from the union, and the employer declined to bargain further with the union. On complaint, the Board found that the revocations had not occurred until the irregular negotiations with the employees, and that the subsequent refusal to bargain with the union was therefore unlawful. This Court sustained that conclusion because the employees' withdrawal from the union had been encouraged by the employer's unlawful acts.

Although the propriety of the ensuing bargaining order was not challenged in *Medo*, 321 U.S. at 687–688, that issue was considered in *Franks Bros.* v. *National Labor Relations Board*, 321 U.S. 702, decided the same day. In *Franks Bros.*, this Court made clear that such an order is appropriate if a union's loss of majority following an unlawful refusal to bargain is attributable to the employer's unfair labor practices.

> The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. [321 U.S. at 705.]

Indeed, in such cases a bargaining order is not an unusual remedy, but the only adequate means of redressing the unfair labor practices committed. Nor does such

an order "involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop" (*ibid.*).[5]

It is immaterial that in the pending cases the union's loss of majority was shown by an election whereas here (as in *Medo*) it was shown by notices rescinding the authority previously given the union. The important feature in both cases is the Board's determination—sustained in the present case by the court of appeals—that the loss was attributable to employer unfair labor practices. The situation thus brought about can be fully remedied in either situation only by a bargaining order; for a new election would necessarily reflect the altered employee sentiment, which is attributable, at least in part, to the employer's unfair labor practices. Thus the court of appeals' modification of the remedial order made its affirmance of the Board's findings in this regard substantially nugatory.

This case is one of a number of cases in which the Second Circuit has tended to weigh *de novo* the severity of an employer's unfair labor practices in authorization card cases. In earlier cases that court has reversed the Board's findings of refusal to bargain or has declined to enforce a bargaining order based on Section 8(a)(1) and (3) violations where it was its own

[5] See also *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16; *National Labor Relations Board* v. *Int'l Union, Progressive Mine Workers*, 375 U.S. 396, summarily reversing 319 F. 2d 428 (C.A. 7).

judgment that the unfair labor practices were not flagrant. See, *e.g., National Labor Relations Board* v. *Adhesive Products Corp.*, 281 F. 2d 89, 91–92 (C.A. 2); *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74, 77–80 (C.A. 2); *National Labor Relations Board* v. *Better Val-U Stores*, 401 F. 2d 491, 494–496 (C.A. 2). Here, that court affirmed refusal-to-bargain findings but denied the Board's order much of its force by eliminating the bargaining requirement, and did so on the same general basis of reevaluating the employer's culpability.[6] As in the earlier cases, the court of appeals' action stemmed from its view that since a bargaining order based on authorization cards "dispenses with the necessity of an election, there is always the risk that a bargaining representative may be imposed on employees, at least for a time, when they no longer wish it to represent them" (App. A, *infra*, p. 14a).

Thus, the basic justification for the court's interference with the Board's remedial choice in this case is the same doubt regarding the Board's handling of authorization cards which animates the pending *Sinclair* and *Gissel* cases generally. If the Court sustains the Board's findings in those cases, it may accordingly follow that the fundamental basis for the decision below in this case is repudiated. And any decision the Court reaches on the remedial question in *Sinclair* and

[6] The court's evaluation of the factual circumstances of this case is unwarranted: the Company's meeting with the employees, which constituted an unfair labor practice, was not as "innocent" as the court suggests; and the court overlooks the Company's earlier coercive action in discharging Collins, the instigator of the union activity.

General Steel Products will be determinative of—or at least illuminate—the issue in the present case.[7]

2. The decision below is inconsistent with the general principles which this Court has enunciated respecting the scope of the Board's remedial authority. Section 10(c) of the Act empowers the Board to order a person who has engaged in an unfair labor practice "to take such affirmative action * * * as will effectuate the policies of this Act." Under this provision, the Board has power to enter an order which will restore "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices]." *Phelps-Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194. This Court has continually emphasized the breadth of the Board's authority to mold a remedy to fit a particular violation and undo its ill effects.[8] What the Board ordains will not be set aside "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Corp.* v. *National Labor Re-*

[7] If the pending cases were to be decided adversely to the Board, there would, of course, be no occasion for further review here, since here the basic refusal-to-bargain finding was premised upon a union majority as shown by authorization cards.

[8] See *e.g., Fibreboard Corp. v. National Labor Relations Board,* 379 U.S. 203, 216; *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.,* 308 U.S. 241, 250; *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 361–366; *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533, 538–544; *Int'l Ladies' Garment Workers' Union* v. *National Labor Relations Board,* 366 U.S. 731, 735, 736, 739–740; *Franks Bros., supra.*

lations Board, 379 U.S. 203, 216, quoting from *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533, 540.

If the refusal-to-bargain violation was properly found in this case, it can hardly be said that the relief ordered by the Board sought to achieve improper ends. As shown, a bargaining order is the usual and perhaps only adequate remedy for such a violation. As in *National Labor Relations Board* v. *Strong,* 393 U.S. 357, and *National Labor Relations Board* v. *The Kroger Co.,* petition for a writ of certiorari pending, No. 1130, this Term, the court's refusal to enforce the Board's remedy despite its agreement as to the unfair labor practices committed is a serious departure from settled principles governing the Board's authority to devise appropriate remedies for unfair labor practices.

CONCLUSION

Because this Court's decisions in the *Sinclair* and *Gissel* cases will undoubtedly affect the questions presented here, we urge that this case be held pending decision in those cases, and that the petition for a writ of certiorari be granted if the Board is upheld in *Sinclair* and *Gissel.* In that event, we suggest that the case would be an appropriate one for summary reversal or for vacation and remand for further consideration. Alternatively, it would be appropriate that the case be

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argued with respect to the appropriate scope of court of appeals review of Board remedial orders.

Respectfully submitted.

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APRIL 1969.

APPENDIX A

In the United States Court of Appeals
for the Second Circuit

No. 129—September Term, 1968

(Argued October 30, 1968 Decided November 27, 1968)

Docket No. 32120

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBECK OIL CORPORATION, RESPONDENT

Before LUMBARD, *Chief Judge,* KAUFMAN and HAYS, *Circuit Judges*

Petition by the National Labor Relations Board for enforcement of its order requiring an employer to cease and desist from any further violations of § 8(a)(1) and (5) of the National Labor Relations Act, to reimburse an employee it had discharged in violation of § 8(a)(3) and subsequently offered to rehire for any wages lost as a result of the discrimination against him, to recognize and bargain with the Union, and to post the customary notices. Enforcement granted as to all portions of the order except that requiring direct bargaining, as to which the Board's order is modified.

WILLIAM J. AVRUTIS (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Coun-

sel, Marcel Mallet-Prevost, Assistant General Counsel, Elliot Moore, Attorney), *for Petitioner.*

WILLIAM J. LARKIN, II (Waterbury, Conn.), *for Respondent.*

KAUFMAN, *Circuit Judge.* This case comes before us on petition of the National Labor Relations Board for enforcement of its order against The Pembeck Oil Corporation (hereinafter referred to as the Company).[1] The Trial Examiner found that the Company had violated § 8(a)(1), (3) and (5) of the National Labor Relations Act by 1) refusing to bargain with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677 (hereinafter referred to as the Union), 2) bargaining directly with its employees, 3) causing them to repudiate the Union, and 4) discriminatorily discharging Collins, one of its employees, for union activity. Accordingly, he recommended that the Company be ordered to cease and desist from further violations of § 8(a)(1) and (5), to reimburse Collins for the loss of wages he suffered as a result of the discrimination[2] and to bargain with the Union. The Board adopted the Trial Examiner's findings and recommendations in their entirety. Since we believe, upon review of the record, that there is substantial evidence to support these findings, we grant enforcement of the Board's order, except that, for reasons discussed below, we modify that portion of the order requiring the Company to bargain with the Union.

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[1] Pembeck is a Connecticut corporation engaged in commerce within the meaning of the Act, and the alleged unfair labor practices occurred in Meriden, Connecticut, its principal place of business, all within the jurisdiction of this court.

[2] Since the Company had voluntarily offered to rehire Collins, there was no need for an order directing his reinstatement.

I

The Company is engaged in the business of selling fuel oil, and installing and servicing oil burners in homes and commercial establishments. In the operation of its business the Company employs servicemen who install, service, and repair industrial and domestic oil burners, truck drivers who deliver fuel oil to its customers, sootmen who clean oil burners and related equipment, and a maintenance man who works in the Company's warehouse keeping the shop clean and taking care of the stock.[3] At the time of the events in question, the Company employed 15 such workmen: eight servicemen, two drivers, four sootmen and one maintenance man. Two of the servicemen performed only domestic work, while the other six were engaged in both industrial and domestic work; additionally, two of these six also installed oil burners in buildings under construction, work which the Trial Examiner found occupied their time for only about six weeks out of a year. During the summer when few oil deliveries were made, the drivers were engaged primarily in assisting the servicemen, a task also performed on rare occasions by the sootmen. All these employees are hourly rated and carry timecards, and, except for the maintenance man, all wear the same uniform. In addition, all are covered by a Company insurance program, have the same vacation and sick privileges, and share the same shop facilities.

Prior to the events in question, no labor organization had represented all of the Company's employees. The two servicemen who install oil burners in buildings under construction were, however, covered by a collective bargaining contract between the Company

[3] In addition, the Company employs several office clerks, but they are not in any way affected by the events here in question.

and Local Union No. 21, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (hereinafter referred to as the Plumbers Union). This contract applied only when these two employees were actually performing the special work of installing oil burners in buildings under construction. When they were engaged in their usual tasks as servicemen, it was not operative except that it permitted them to participate in a health, welfare, and pension program provided for in the agreement.

The company supervisors are its president, Fred J. Knell, secretary John W. Grant, dispatcher Robert J. Thuotte, and sales engineer Arthur Moskaluk. Knell oversees the entire operation. Moskaluk assigns work to all servicemen, assists them with technical problems, and occasionally directs the work of the sootmen, drivers and maintenance man, although these employees are normally supervised by Thuotte and Grant.

The events giving rise to the unfair labor practices here in question began on August 18, 1966, when the Company hired Carl Collins as a fuel delivery driver. According to Collins' testimony before the Trial Examiner, at the time he was hired he was told about the Company's "job training," in reference to which Thuotte said that Collins would "go out with another man for a while to learn the job and that (the Company) invested approximately a year in a man before he would become efficient like they like their employees to be." During this interview Collins was wearing a union button, and he informed his interviewers that he had been a union member.

Shortly after August 19, when Collins commenced his employment, other employees expressed to him dissatisfaction with their working conditions, and, knowing that he was a union member, requested that he

contact someone to whom they could talk about joining a union. Collins called James Galullo, the Union's Business Agent, who sent authorization cards and literature to the employees and additional authorization cards to Collins. Collins distributed these cards among the employees and also discussed with them, individually and in groups, the benefits they might derive from representation by the Union.

By September 8, nine of the fifteen employees had signed authorization cards.[4] The following day, the Union sent a letter to the Company stating:

> "Teamsters Local Union No. 677, hereby notifies you that a majority of your truck drivers, oil burner servicemen and installers, mechanics, and helpers have authoized our Union to act as their representative for the purpose of negotiating a labor contract covering their wages, rates of pay, hours of work, and other working conditions.
>
> "I suggest that the first negotiating session be held during the week beginning Sunday, September 11, 1966, at a time which is convenient."

Knell received this letter the morning of September 12.[5] According to his testimony, he was taken by surprise and "overwhelmed" by its contents, and he immediately retained an attorney, who replied to the Union the following day, saying:

> "* * * The Pembeck Oil Corporation disputes your claim that a majority of the truck drivers, oil burner servicemen and installers, mechanics, and helpers employed by that Com-

[4] These cards stated: "I hereby authorize the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to represent me for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *."

[5] On this day the Union filed a representation petition, which was later withdrawn without prejudice.

pany have authorized you to act as their bargaining representative.

"In addition, the Pembeck Oil Corporation disputes the appropriateness of the unit.

"The Pembeck Oil Corporation will recognize you only if you are certified as the bargaining agent as a result of an election conducted by the National Labor Relations Board * * *.

"It is the Company's opinion and position that any cards signed by any of its employees were cards signed solely for the purpose of obtaining a representation election conducted by the National Labor Relations Board and, if not for that purpose, were signed based upon misrepresentations by representatives of your Union as to the import of these cards."

On the same day that the Company received the Union's letter requesting recognition and bargaining, it discharged Collins. At the time, Grant explained to Collins as the reason for his discharge that he had made "too many mistakes in computing the price of fuel oil." And later that day Grant gave Collins a Connecticut Employment Security Division form in which, under the caption "Reason for Unemployment," he had specified "Inability to Figure or Compute Prices." Before the Trial Examiner, both Thuotte and Grant stated that they had made the decision to fire Collins jointly, after conferring together, but they gave somewhat different explanations for the discharge. Thus, Thuotte testified that their decision was based on Collins' errors in computing oil prices and his failure to deliver oil to a customer at the specified time, while Grant added to these reasons Collins' spillage of oil on a customer's cellar floor, delivery of oil to a customer who did not order any, and giving a customer an invoice intended for another.

On the following evening, about 10 of the Company's employees and Collins met with Galullo at the

Union's headquarters, where they discussed Collins' discharge and the Company's refusal to recognize the Union. In addition, the employees submitted to Galullo a list of benefits which they expected the Union to obtain for them through negotiation with the Company. It was decided at this meeting that the employees should strike for the purpose of securing Collins' reinstatement and obtaining a collective bargaining contract.

Accordingly, the next day, September 14, most of the employees who had attended the meeting the previous evening struck and picketed the Company's premises. Early the following morning, however, the employees abandoned the strike, apparently because the two servicemen employed by the Company who were members of the Plumbers Union had not honored their picket line during the previous day. Then one of the employees, Carlson, acting for all the striking employees, telephoned Grant to ask whether they "could come in and sit down and talk." When Grant agreed, the employees went to the Company premises, where they met with Knell, Thuotte, and Grant.

Carlson initiated the discussion by saying that the employees were there to discuss their "gripes," to which Knell replied "that he had no idea things had gotten as bad as they were * * * that this was a good thing that it did come out * * * and that * * * we could straighten something out by having this get together." Among the subjects which the employees then mentioned were the lack of a pension plan, their desire for a posted pay scale, and their concern about sick and holiday pay. No specific proposals were presented by either side, and no agreement was reached, except that they would all meet again during the following week. The employees then withdrew to

the Company's shop to prepare specific proposals to present at the next meeting.

Before the meeting had started, Knell had called the Company's attorney for advice as to what action the Company should take under the circumstances, but he had been unable to reach him. Counsel returned the call while the employees were conferring in the shop, and upon learning of the morning's events, he informed Knell that the Company was not permitted to meet further with the employees since they had signed authorization cards and accordingly were considered members of the Union. Grant and Knell promptly told the employees that, upon the advice of their attorney, they could not meet with them further, explaining that their attorney had informed them "you have signed cards, and you are automatically represented by the Union."

Later the same day, the employees decided that they no longer wished the Union to represent them. Subsequently they engaged an attorney of their own choice who under their instruction, sent formal notices informing the Union that the employees rescinded the authority they had previously given the Union to represent them.

II

Turning first to the alleged violation of § 8(a)(3), the Trial Examiner found, and the Board agreed, that the Company had been motivated by antiunion considerations in discharging Collins. The Company contends rather that it released Collins because of the many serious mistakes he made during the short term of his employment. Even if we view the facts most charitably toward Collins, we must agree that he had displayed no small ineptitude in the relatively short period he was on the job. From the Company's un-

disputed evidence, it appears that Collins made numerous blunders in computing the invoices for the oil he delivered, pumped oil on the cellar floor of one customer, spilled oil on the lawn of another, and failed to make an oil delivery at the scheduled time. Nevertheless, the rule is well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate § 8(a)(3) if it was in fact motivated, even partially, by the employee's union activity. *N.L.R.B.* v. *Milco, Inc.*, 388 F. 2d 133 (2d Cir. 1968); *N.L.R.B.* v. *D'Armigene, Inc.*, 353 F. 2d 406 (2d Cir. 1965); *N.L.R.B.* v. *Great Eastern Color Lithographic Corp.*, 309 F. 2d 352 (2d Cir. 1962), cert. denied, 373 U.S. 950 (1963). Thus, where there are legitimate reasons for the discharge of an employee, the question is whether those were in fact the only grounds for the dismissal, or whether they were "put forth as a mere pretext to justify an impermissible discharge." *N.L.R.B.* v. *Milco, Inc., supra* at 138.

In this instance, the Trial Examiner relied on several factors in determining that the Company dismissed Collins not for his inadequate performance on the job, but because of his leadership in organizing the Company's employees. First, he noted that Collins was told at the time he was hired that the Company did not expect him to become proficient at his work for approximately a year, and the Examiner reasonably inferred from this that the nature of the job was such that the Company must have expected a new employee such as Collins to make mistakes. Second, he observed that although Collins' initial errors came to the Company's attention in the first week of his employment, no action was taken until two weeks later, at which time, and within hours after Knell received the Union's request for recognition, Collins was

summarily discharged. And finally, the Trial Examiner found his conclusion that the reason for the discharge asserted by the Company was merely a pretext buttressed by the fact that Grant and Thuotte gave somewhat divergent, if not actually conflicting reasons for their joint action.

Although these factors do not lead inescapably to the conclusion reached by the Trial Examiner and the Board, they do offer it substantial support. See *N.L.R.B.* v. *Great Eastern Color Lithographic Corp., supra; N.L.R.B.* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829 (2d Cir. 1968). The Company, nevertheless, argues that we should reverse the Board because there is no proof that it actually knew of Collins' union activities prior to his discharge. But although such knowledge is a necessary ingredient of a violation of § 8(a)(3), it need not be established by direct evidence; inferences may be drawn from the surrounding circumstances. In view of the evidence that, 1) the Company knew Collins had been a union member when it hired him, 2) there were only a small number of employees in the Company's plant and most of Collins' activity on behalf of the Union was conducted in the plant during working hours, *N.L.R.B.* v. *Joseph Antell, Inc.*, 358 F. 2d 880 (1st Cir. 1966) (the "Small Plant Doctrine"), and 3) Collins' discharge occurred abruptly within hours after the Company received the Union's request for recognition, we believe there was substantial evidence to justify the conclusion that the Company had knowledge of Collins' union activity. Accordingly, we affirm the finding that Collins' discharge was in violation of § 8(a)(3).

III

With respect to the other alleged unfair labor practices, the Trial Examiner found, and the Board

agreed, that the Company had violated § 8(a)(5) by refusing to bargain with the Union and then by bargaining directly with the employees, and that it had violated § 8(a)(1) by causing the employees to repudiate the Union. As to the first charge, the Company's response is that it was justified in refusing to bargain with the Union because it believed the bargaining unit which the Union claimed to represent (all 15 of the employees) was inappropriate and because it had a good faith doubt that the Union had been authorized by a majority of the employees to represent them. The Trial Examiner found, however, that in view of the similarity of conditions under which all the employees worked, and the overlapping of their functions and supervision, all the employees shared a large measure of community interest and hence constituted an appropriate unit for purposes of collective bargaining. *United Aircraft Corp.* (*Hamilton Standard Div.*) v. *N.L.R.B.*, 333 F. 2d 819 (2d Cir. 1964), cert. denied 380 U.S. 910 (1965). Moreover, the Trial Examiner reasoned that the coverage of the two servicemen in the contract between the Company and the Plumbers Union did not preclude their inclusion in the bargaining unit, since they were dual-function employees, and the Plumbers Union contract was operative only for the short period during the year when they were doing the specialized work of installing oil burners in buildings under construction. Since we find this result well within the Board's discretion, we see no reason to upset the determination that the bargaining unit chosen by the Union was an appropriate one. *N.L.R.B.* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620 (2d Cir.), cert. denied 355 U.S. 818 (1957).

Furthermore, the law is settled that a sincere belief that a bargaining unit chosen by the union is improper does not constitute a defense to a violation

of § 8(a)(5) where that unit is in fact an appropriate one. *United Aircraft Corp. (Hamilton Standard Div.)* v. *N.L.R.B., supra; Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289 (4th Cir. 1964).

The Company contends, moreover, that the employees were induced to sign the Union authorization cards by misrepresentations as to their purpose and hence such cards should not be considered evidence of a Union majority. However, the Trial Examiner found, and his findings are supported by the evidence, that the cards unequivocally authorized the Union to represent those who signed for the purpose of collective bargaining, and that no misrepresentations were made by Collins or any other Union representative to the employees at the time they signed the cards.[6] The only evidence offered by the Company in support of its contention was the testimony of several employees that they were under the impression the cards were intended for a purpose other than authorizing the Union to represent them. We believe that the Trial Examiner was correct in concluding that where an authorization card is clear on its face, and union representatives have made no misrepresentations with respect to it, an employee's thoughts as to what he believed was the purpose to be served by the card cannot be used to discredit a majority the Union has legitimately achieved. *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732, 743 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951). Furthermore, we believe the Trial Examiner's finding that the Company's discharge of Collins and commencement and abrupt ter-

[6] The Trial Examiner did find that Collins misrepresented to one of the employees that he was the only one who had not signed a card when in fact at the time only six of the fifteen had done so. For this reason, he discounted Emery's card in ascertaining the Union's majority status.

mination of direct bargaining with the employees indicated the Company's bad faith in refusing to bargain is adequately supported by the evidence and should be affirmed. Additionally, since the Union was authorized by a majority of the employees in an appropriate bargaining unit to represent them, the Company's direct bargaining with the employees constituted an independent violation of § 8(a)(5). *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678 (1944).

Finally, the Trial Examiner and Board found that by first meeting directly with the employees and instilling in them the expectation that it would improve their conditions of employment, and then withdrawing its offer for future negotiations because they had signed authorization cards, the Company had induced the employees to repudiate the Union in violation of § 8(a)(1). Although the evidence was not overwhelming that the Company's conduct was in fact the cause of the employees' decision to withdraw from the Union, the Board's inference was reasonable, and in view of its special qualifications to determine the effects of such actions on the minds of the employees, *N.L.R.B.* v. *Stow Manufacturing Co.*, 217 F. 2d 900 (2d Cir. 1954), cert. denied 348 U.S. 964 (1955), we do not feel it appropriate to disturb their determination.

IV

Having found that the Company's conduct described above did violate § 8 (a)(1) and (5), we are left with the question whether the remedy ordered by the Board—direct bargaining with the Union—is appropriate in this case. It is well established that the Board may properly order an employer found to have committed unfair labor practices to bargain directly

with a Union which lost its majoity subsequent to the employer's wrongful refusal to bargain with it. *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 (1944). Nevertheless, we are not unmindful of the potency of such a remedy. Since it dispenses with the necessity of an election, there is always the risk that a bargaining representative may be imposed on employees, at least for a time, when they no longer wish it to represent them. *N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74 (2d Cir. 1965); *N.L.R.B.* v. *Better Val-U Stores of Mansfield, Inc*, —— F. 2d —— (2d Cir. decided September 10, 1968).

A bargaining order is clearly appropriate "where the employer's conduct has been so flagrantly hostile to the organizing efforts of a union" that any future election would be tainted by his past transgressions. *N.L.R.B.* v. *Flomatic Corp.*, *supra* at 78. But here there has been no such display of flagrant hostility as would suggest that a future election would not actually reflect the desires of the employees. The conduct of the Company to which the Board attributes the employees' defection from the Union was hardly vituperative; indeed it seems more the result of inadvertence than anything else. We recall that it was the employees who initiated the direct bargaining, and that Knell had attempted unsuccessfully to get legal advice before he began conferring with them but his Counsel was not available. When his lawyer returned his call and advised Knell that he could not confer with the employees, he promptly terminated the talks. Of course, these circumstances provide no defense to the unfair labor practice charges, but they do suggest that the climate generated by the Company's actions was not one of hostility and coercion. Moreover, we would be especially hesitant to assume in this case that the employees now desire to be represented by the

Union in view of the fact that only a slim majority of the employees ever signed the authorization cards,[7] and that the employees had in all but a fleeting association with the Union.

We note the dissenting opinion stresses that the appropriateness of a bargaining order should stand or fall simply on which section of the Act has been violated without regard to or examination of the facts which constituted the violation. Thus, it argues that the fact that in this case, unlike *Flomatic* and *Better Val-U Stores*, the employer was found to have violated § 8(a)(5) should cause us to enforce the order by rote. We suggest, however, that the finding of an unlawful refusal to bargain does not *ipso facto* and in all cases lead to the conclusion that an order to bargain must always be the only remedy for the violation. And, we do not take action here, as the dissenting opinion suggests, which is inconsistent with those cases subsequent to *Flomatic* in which we held a bargaining order to be an appropriate remedy for an 8(a)(5) violation based upon a card majority. In each of those cases, the conduct on which the unfair labor practice findings were predicated was found to be clearly hostile to the union, and without question to have contaminated the results of any future election. Indeed, Judge Hays speaking for the majority in *Bryant Chucking Grinder Co.* v. *N.L.R.B.*, 389 F. 2d 565, 568 (2d Cir. 1967) made it clear that the bargaining order was appropriate (in § 8(a)(1) cases) because "the employer deliberately destroyed the union's majority." And, in examining those cases in which the possible applicability of *Flomatic* was considered and then rejected we observe that in *N.L.R.B.* v. *Consolidated*

[7] The Trial Examiner found that the Union represented eight of the employees on September 9, when it first requested recognition.

Rendering Co., 386 F. 2d 699 (2d Cir. 1967), the employer was found to have violated 8(a)(1) by threats of reprisals, promises of benefits and coercive interrogation of its employees, all of which were for the purpose of causing the Union's majority to be dissipated and had the effect of making a free election impossible; and in *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684 (2d Cir. 1966), the employer similarly engaged in a course of conduct, including threats and promises, the purpose of which was to destroy the Union's majority; also in *Irving Air Chute Co.* v. *N.L.R.B.*, 350 F. 2d 176 (2d Cir. 1965), the employer in addition to violating §§ 8(a)(1) and (2) by threatening its employees and attempting to form a company dominated bargaining committee, had clearly demonstrated the bad faith of its refusal to bargain by refusing even to examine the authorization cards evidencing the union's majority. Thus, contrary to our dissenting brother's view, those cases are in no way undercut by our holding on the particular facts before us, where the employer's unfair labor practices have been as minimal as we have indicated and its conduct does not preclude a fair election in the future, and particularly where there is a considerable doubt as to the employees' continued desire to be represented by the Union.

Accordingly, we believe that the Board should have permitted the bargaining representative to be determined by an election held within a reasonable time. A bargaining order in this case would be excessively strong medicine for the ailment and unfair not only to the employer but to the employees as well.

The Board's order will be enforced in all respects except that the direction to bargain is modified as set forth above.

HAYS, *Circuit Judge* (dissenting):

This case illustrates the particularly pernicious effect of a case which erroneously decided in the first place, is gradually broadened to cover other situations never contemplated by the first decision.

In *NLRB* v. *Flomatic Corporation*, 347 F. 2d 74 (2d Cir. 1965), this court decided that the Board could not, under the circumstances there presented, employ a bargaining order to correct a situation in which it had found a Section 8(a)(1) violation. The relevant circumstance on which the court principally relied was that the Section 8(a)(1) violation was not "flagrant."

> "There was no aggressive or planned campaign aimed at dissipating union strength by resort to threats, discharges or refusals of recognition. On the contrary, the Board found that the employer was never asked to bargain, and there was evidence that he even expressed a willingness to do so if the employees wanted union representation." 347 F. 2d at 78.

The court went on to say:

> "[T]he courts have implicity recognized that the bargaining order remedy should be applied with restraint, and accordingly have enforced such orders in cases of §§ 8(a)(2), 8(a)(3) and 8(a)(5) violations, some of which were coupled with or included § 8(a)(1) transgressions. [Citing cases.] Those cases involved more glaring violations than the one found here, and where as in § 8(a)(5), an employer has refused to bargain, under circumstances in which he was under a duty to do so because the union enjoyed the status of exclusive bargaining agent, the remedy may be thought uniquely appropriate. No court, however, has held that a borderline, unaggravated § 8 (a)(1) violation, standing alone, occurring prior to an election, warranted a bargaining order." 347 F. 2d at 79.

Thus it is perfectly clear that *Flomatic,* as it was originally decided, stood solely for the narrow proposition that where there was only a non-flagrant Section 8(a)(1) violation, the Board could not order the employer to bargain.

Flomatic was first extended beyond its original limits in *NLRB* v. *Better Val-U Stores,* slip op. 3431, Docket No. 32009 (2d Cir September 10, 1968). In that case there was not only a violation of Section 8(a)(1) but also a violation of Section 8(a)(3) by the discharge of an employee. In spite of the express language of *Flomatic* as to "discharges" and "Section 8(a)(3)" violations, quoted above, the court said [W]e feel compelled by the facts in our case to follow the majority view in *Flomatic.*"

However, in *Better Val-U* the court said:

> "To require an employer to reinstate an employee with back pay, to cease and desist from further unfair labor practices, and to post appropriate notices are proper and accepted remedies for violations of Sections 8(a)(1) and 8(a)(3). See, e.g., *NLRB* v. *A. P. W. Products Co.,* 316 F. 2d 899 (2 Cir. 1963); *NLRB* v. *Firedoor Corp. of America,* 291 F. 2d 328 (2 Cir.), *cert. denied,* 368 U.S. 921 (1961). Accordingly, to this extent we grant enforcement of the Board's order without further comment. However, the Board's imposition of a bargaining order where no violation of Section 8(a)(5) was found to have occurred is a more troublesome matter * * *.
>
> The controlling test in this circuit as to whether a bargaining order is appropriate in a situation where there was no finding of a refusal to bargain by the employer in violation of § 8(a)(5) of the Act was announced by Judge Anderson in *NLRB* v. *Flomatic Corp.,* 347 F. 2d 74 (2 Cir. 1965)." Slip opinion p. 3435.

Thus there can be no doubt that, although the *Flomatic* rule was extended by *Better Val-U* to cover a Section 8(a)(3) violation, there was no intention to extend that case to cover a situation where the Board had found a Section 8(a)(5) violation and was upheld by the court in such a finding. In fact in such a case, the court said in *Flomatic,* a bargaining order "may be thought uniquely appropriate."

During the period since *Flomatic* this court has on several occasions enforced the Board's bargaining orders on the basis of a finding of Section 8(a)(5) violations based on a card count. See *NLRB* v. *Big Ben Department Stores, Inc.,* 396 F. 2d 78 (2d Cir. 1968); *Bryant Chucking Grinder Co.* v. *NLRB,* 389 F. 2d 565 (2d Cir. 1967); *NLRB* v. *Consolidated Rendering Co.,* 386 F. 2d 699 (2d Cir. 1967); *NLRB* v. *Divigard Baking Co.,* 367 F. 2d 389 (2d Cir. 1966); *NLRB* v. *Gotham Shoe Mfg. Co.,* 359 F. 2d 684 (2d Cir. 1966); *Irving Air Chute Co.* v. *NLRB,* 350 F. 2d 176 (2d Cir. 1965).

The majority, overruling *sub silentio* all the intervening cases, now pushes *Flomatic* an enormous distance farther than it has previously been extended and condemns a bargaining order in a case where there was a violation of the duty to bargain under Section 8(a)(5) and where the court has upheld the Board in its finding of such a violation.

It is obvious that the result reached here is not only not required by *Flomatic* and *Better Val-U* but that it is directly at variance with the reasoning of those cases. Moreover it is contrary to numerous previous decisions of this court and contrary to the holding of the Supreme Court in such cases as *Franks Bros. Co.* v. *NLRB,* 321 U.S. 702 (1944).

APPENDIX B

In the United States Court of Appeals, for the Second Circuit

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No. 32,120

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBEK OIL CORPORATION, RESPONDENT

JUDGMENT

Before LUMBARD, *Chief Judge,* KAUFMAN and HAYS, *Circuit Judges.*

This cause came on to be heard upon a petition of the National Labor Relations Board for enforcement of its order, dated June 14, 1967, against the above-named Respondent, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 30, 1968, and has considered the briefs and transcript of record filed in this cause. On November 27, 1968, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's order as modified. In conformity therewith, it is hereby

Ordered and adjudged by the Court that Pembek Oil Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or inducing employees to repudiate International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, Local Union No. 677, or any labor organization.

(b) Causing or inducing employees to rescind the authority of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization, to represent them for purposes of collective bargaining.

(c) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization, by discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, as amended, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8(a)(3) of the Act.

2. Take the following affirmative action which, the Board has found, will effectuate the policies of the National Labor Relations Act, as amended:

(a) Make Carl Collins whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records or reports, and all other records necessary or useful to determine the amount of backpay due under the terms of this judgment.

(c) In the event that the Board hereafter holds an election among respondent's employees in the following appropriate unit:

> All employees employed by respondent, including fuel truck drivers, installation men, servicemen, power cleaners, also known as sootmen, and maintenance men, excluding salesmen, office clerical employees and supervisors as defined in the Act.

in which a majority of the valid ballots are cast for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677 as the exclusive collective-bargaining representative of said employees, upon request, recognize and bargain collectively with said Union as such representative concerning rates of pay, wages, hours, or other terms or conditions of employment.

(d) Post, at its premises copies of the attached notice marked "Appendix". Copies of said notice, to be furnished by the Regional Director for Region 1 of the National Labor Relations Board (Boston, Massachusetts), after being signed by an authorized representative of respondent, shall be posted by respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 10 days from the date of this judgment, what steps respondent has taken to comply herewith.

J. EDWARD LUMBARD,
Judge, United States Court of Appeals for the Second Circuit.
IRVING R. KAUFMAN,
Judge, United States Court of Appeals for the Second Circuit.

Filed: DECEMBER 19, 1968.

Appendix

NOTICE TO ALL EMPLOYEES

Pursuant to a judgment of the United States Court of Appeals Enforcing as modified an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

After a trial in which both sides had the opportunity to present their evidence it has been found that we violated the law by committing unfair labor practices and we have been ordered to post this notice and to keep the promises that we make in this notice.

We will not cause, induce, request, or encourage you to repudiate, withdraw or resign, from International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union.

We will not cause, induce, request, or encourage you to cancel, or seek the return of, any card you may have signed naming, authorizing, or designating International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union, to act as your collective-bargaining representative.

We will not discourage union activity or membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union, by discriminating against you if you choose to engage in union activity, or if you join International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, Local Union No. 677, or any other union.

We will not in any other way interfere with, restrain, or coerce you in the exercise of any rights guaranteed to you by the National Labor Relations Act. In this connection, we will respect your rights to self-organization, to form, join, or assist any union, to bargain collectively through any union or representative of your choice as to wages, hours of work, and any other term or condition of employment. You also have the right, which we also will respect, to refrain from doing so.

We will not discriminate against any employees for engaging in union activity or for joining any union. Since it has been found that we did so when we fired Carl Collins, to whom we have already offered full reinstatement to his old job, we will pay him for any loss he suffered because we fired him.

In the event that the Board hereafter holds an election among the employees in the following appropriate unit:

> All persons whom we employ, including fuel truck drivers, installation men, servicemen, power cleaners, also known as sootmen, and maintenance men, but excluding salesmen, office clerical employees and supervisors.

in which a majority of the valid ballots are cast for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, as the exclusive representative of the employees in that unit, we will, upon request, bargain collectively with that Union as such representative with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and put into writing and sign any agreement which is reached.

All our employees are free to become, remain, or refrain from becoming or remaining, members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union.

THE PEMBEK OIL CORPORATION
(Employer)

Dated_____ By_____
(Representative) (Title)

The notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 20th Floor, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, Telephone 223-3300.

A true copy.

A. DAVID FUSARO,
Clerk.

In the United States Court of Appeals for the Second Circuit

No. 32120

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBEK OIL CORPORATION, RESPONDENT

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
IRVING R. KAUFMAN,
PAUL R. HAYS,
(dissenting)
Circuit Judges.

JANUARY 16, 1969.

In the United States Court of Appeals for the Second Circuit

No. 32120

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PEMBEK OIL CORPORATION, RESPONDENT

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner and all of the active judges concurring, except Judge Hays who votes to grant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

JANUARY 16, 1969.

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 1-CA-5652

THE PEMBEK OIL CORPORATION

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 677

DECISION AND ORDER

On March 21, 1967, Trial Examiner Alvin Lieberman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of these allegations. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision together with a supporting brief, and the General Counsel filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, The Pembek Oil Corporation, Meriden, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C., June 14, 1967.

GERALD A. BROWN,
HOWARD JENKINS, Jr.,
SAM ZAGORIA,

Members,

[SEAL] *National Labor Relations Board.*

[1] In the absence of exceptions, we adopt *pro forma* the Trial Examiner's finding that employee Emery's authorization card is invalid because he signed it on the misrepresentation that he was the only employee in the unit who had not signed a card. *Phil-Modes, Inc.*, 159 NLRB No. 84; *Dan Howard Mfg. Co.*, 158 NLRB No. 54; cf. *Merrill Axle and Wheel Service*, 158 NLRB No. 107.

TXD–101–67
Meriden, Conn.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case 1–CA–5652

THE PEMBEK OIL CORPORATION
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 677

Norman Zankel, Esq., Boston, Mass., for the General Counsel.
Mr. James Galullo, Waterbury, Conn., for the Charging Party.
William J. Larkin, 2d. Esq., Waterbury, Conn., for Respondent.
Before ALVIN LIEBERMAN, *Trial Examiner*.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard by me in Meriden, Connecticut, on November 28, 29, and 30, 1966[1] upon a complaint of the General

[1] All dates referred to in this Decision fall within 1966.

Counsel [2] and respondent's answer. The issues litigated were whether respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act). More particularly, the questions for decision are as follows:

1. Did respondent violate Section 8(a)(3) and (1) by discharging Carl Collins? [3]

2. Was the unit for which the Union requested recognition from, and bargaining with, respondent appropriate for those purposes?

3. Did the Union represent a majority of respondents' employees in a unit appropriate for collective bargaining when the foregoing request was made?

4. Did respondent violate Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union, by

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[2] The complaint was issued on a charge filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677 (herein called the Union). During the trial the complaint was amended to set forth the name of the Union as it appears in the caption and by substituting for paragraph 10, as originally set forth, the following paragraph:

"10. All employees employed by Respondent at West Main Street, Meriden, Connecticut including fuel truck drivers, installation men, servicemen, soot men, but excluding salesmen, office clerical employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act."

[3] On motion of respondent made at the conclusion of the General Counsel's case-in-chief paragraph 8 of the complaint which alleges that respondent failed and refused to reinstate Collins and so much of paragraph 9 and other paragraphs of the complaint which relate to paragraph 8 were dismissed for the reason that the General Counsel offered no evidence to establish those allegations. I have been urged by the General Counsel to reconsider this ruling and I have done so. Having reconsidered and having taken into account the General Counsel's arguments I find no convincing reason for changing my ruling.

bargaining directly with its employees, by inducing them to abandon a lawful strike, or by inducing them to repudiate the Union?

Upon the entire record,[4] upon my observation of the witness and their demeanor while testifying, and upon careful consideration of the arguments made and briefs submitted by the General Counsel and respondent, I make the following:

FINDINGS OF FACT[5]

I. Respondent's business

Respondent, a Connecticut corporation, whose principal office and place of business is located at Meriden, Connecticut, is engaged there in the installation and servicing of oil burners and related equipment and in the retail sale of fuel oil. Respondent annually purchases and receives products valued in excess of $50,000 from suppliers located outside the State of Connecticut and respondent's gross volume of business annually exceeds $500,000. Accordingly, I find that respondent is engaged in commerce within the meaning of the Act and that the assertion of jurisdiction over this matter by the National Labor Relations Board (herein called the Board) is warranted. *Siemons Mailing Service,* 122 NLRB, 81, 85; *Carolina Supplies and Cement Co.,* 122 NLRB 88, 89.

II. The labor organization involved

The Union is a labor organization within the meaning of the Act.

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[4] Attached hereto as Appendix B is an order correcting the stenographic transcript of this proceeding in certain respects.

[5] The motion to dismiss the complaint made by respondent at the close of the trial is disposed of in accordance with the findings and conclusions set forth in this Decision.

III. The alleged unfair labor practices

A. Introduction

Briefly, this case concerns itself with the events following the Union's authorization by respondent's employees to act as their collective-bargaining representative. Among these were the Union's demand for, and respondent's refusal of, recognition and bargaining; the discharge of one employee; a strike; respondent's direct bargaining with the striking employees; and, coming full circle, the employees' repudiation of the Union.

The General Counsel contends that respondent's refusal to recognize and bargain with the Union pursuant to its demand was based upon its determination to gain time within which to destroy the Union's status as the collective-bargaining representative of the employees concerned, hence in violation of 8(a)(5) of the Act. In support of this argument the General Counsel points to respondent's discharge of an employee, claimed by the General Counsel to have been discriminatory and, accordingly, violative of Section 8(a)(3) of the Act; to its direct bargaining with employees who had earlier signed cards authorizing the Union to act as their collective-bargaining agent which, the General Counsel postulates, induced the employees involved to abandon a lawful strike and repudiate the Union, all in violation of Section 8(a)(1) and 8(a)(5) of the Act.

Taking issue with the General Counsel on all points respondent argues that it has not violated Section 8(a)(5) of the Act by its refusal to accede to the Union's demand for recognition and bargaining because of its good-faith doubt as to the Union's claim that it represented a majority of its employees; because the unit for which the Union requested recogni-

tion is not appropriate for collective-bargaining purposes; and because the authorization cards, upon which the Union's majority is bottomed, are invalid by reason of misrepresentations in their procurement. Further respondent argues that it did not engage in direct bargaining with the employees concerned and that any dealing by respondent directly with its employees was discontinued immediately upon its being advised that such conduct might be, in the circumstances of this case, improper. Running out the skein, insofar as this phase of the case is concerned, respondent contends that its direct dealing with its employees, did not induce them to abandon their strike or to repudiate the Union. Finally, while admitting the discharge, respondent asserts that it was occasioned solely by the many errors made by the employee in question and that it had no prior knowledge of his activities on behalf of the Union.

B. Facts

The nature of respondent's operations

Respondent installs and services oil burners in existing commercial establishments and homes, the former being referred to as industrial work and the latter as domestic work. In addition, respondent on occasion installs oil burners in buildings under construction and regularly sells fuel oil.

Insofar as material, in the operation of its business respondent employs installer-servicemen, power cleaners, oil truck drivers (herein respectively called servicemen, sootmen, and drivers) and a maintenance man. The usual duties of the servicemen, who exercise skills not possessed by respondent's other employees, consist of installing, servicing, and repairing industrial and domestic oil burners and related equipment, in existing buildings. During the period critical

to this proceeding respondent employed eight servicemen, of whom six did both industrial and domestic work. Of these, two also installed oil burners in buildings under construction. This work, however, occupied their time for only about 6 weeks a year. The remaining two servicemen did only domestic work.

Respondent's drivers deliver fuel oil to its customers, compute the amount of money due from customers for the oil delivered by them, and enter this sum on an invoice which is left with the customer at the time of the delivery. Although their principal duties relate to the delivery of fuel oil, the drivers also assist servicemen. This type of work is done by the drivers for about 2 or 3 months a year, generally in the summertime, when there are little, or no, deliveries to be made. As John W. Grant, respondent's secretary, testified, "in a given week [during this period a driver could spend] all his time or 90 per cent of his time" assisting servicemen.

The sootmen clean oil burners and related equipment. On rare occasions sootmen also assist servicemen. The maintenance man, as Grant further testified, "keeps [the shop] clean" and "takes care of the stock."[6]

Respondent is party to a collective-bargaining contract with Local Union No. 21, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (herein called Plumbers

[6] The findings with respect to the duties of respondent's employees are based on the testimony of Grant; Fred J. Knell, respondent's president; Robert J. Thuotte, its office manager and dispatcher; Thomas F. Yale, a driver employed by respondent; and Carl Collins, who was employed as a driver by respondent and whose discharge is claimed by the General Counsel as having been violative of Section 8(a)(3) of the Act.

Union).[7] This contract covers two of respondent's employees, the servicemen who install oil burners in buildings under construction. It is applicable, however, only when they perform this type of work, which, as I have found, they do for about 6 weeks during each year. The contract has no relevance when the employees concerned perform the usual functions of servicemen: i.e., installing, servicing, and repairing oil burners in existing buildings.[8]

The maintenance man spends all his working time in respondent's warehouse. The servicemen, sootmen, and drivers work there when they are not performing duties away from respondent's premises.

The sevicemen, sootmen, drivers, and maintenance men are hourly rated and each has a timecard. Except for the maintenance man, they wear the same work uniform. All, including the maintenance man, benefit from an insurance program maintained by respondent,[9] have the same vacation and sick leave privileges, and, as Grant, respondent's secretary related, share the same restroom "and other facilities in the shop." [10]

At the trial it was stipulated that Knell, Grant, Thuotte, and Arthur Moskaluk, respectively respondent's president, secretary, office manager and dispatcher, and sales engineer, are its only supervisors. As respondent's president, Knell is "overseer of the whole operation."

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[7] Insofar as it may be material, I find that Plumbers Union is a labor organization within the meaning of the Act.

[8] These findings are based on the contract between respondent and Plumbers Union, which is in evidence as respondent's Exhibit 10 and the testimony of Knell, respondent's president.

[9] The two servicemen covered by the Plumbers Union contract participate additionally in a health, welfare, and pension program provided for by that agreement.

[10] The findings in this paragraph are based on Grant's testimony.

Respondent's sales engineer assigns work to all servicemen, "directs the activities" of those performing industrial work, and, on occasion, also directs the work of the sootmen, drivers, and maintenance man. Whenever a serviceman encounters "difficulty on [a] job," apparently without regard to whether the problem arises on industrial or domestic work, assistance is sought from, and given by, the sales engineer.

The work of the drivers, domestic servicemen, and maintenance man is normally supervised by the respondent's dispatcher. Respondent's secretary "directs the activity" of the sootmen and assists the sales engineer in assigning work to the servicemen. The dispatcher regularly "reports" to respondent's president, and from time to time to its secretary.[11]

Respondent's collective-bargaining history

It has already been found that respondent and the Plumbers Union are parties to a contract covering those of respondent's servicemen, presently two in number, who install oil burners in buildings under construction. Respondent has had similar contracts with the Plumbers Union since about 1950. However, no labor organization has ever represented all of respondent's employees.[12]

The Union's organizing campaign

Shortly after Collins started to work for respondent[13] he began to hear complaints from other em-

[11] The findings with respect to the functions of respondent's supervisors are based on Grant's testimony.

[12] These findings are based on the testimony of Knell and Grant, respectively respondent's president and secretary.

[13] As will appear below Collins, whose discharge, as already noted, is alleged by the General Counsel as having been violative of Section 8(a)(3) of the Act, was hired by respondent on August 19.

ployees concerning their working conditions, and, because he was a union member, was requested by several to "contact someone for them to talk to about a union." Accordingly, Collins communicated with James Galullo the Union's business representative, who sent authorization cards and literature to respondent's employees. Galullo also sent a supply of authorization cards to Collins, some of which Collins distributed among respondent's employees.

In addition to distributing the cards, Collins met with respondent's employees individually and in groups and informed them of the benefits to be derived from representation by the Union. There was also a meeting on September 13, at the Union's headquarters attended by some of respondent's employees and Galullo, the Union's business representative. At this meeting Galullo asked those present who had not signed cards to do so and received from the employees a series of proposals as to terms and conditions of employment which, as Galullo stated, "they wanted the union to negotiate on." [14]

The Union's requests for recognition and respondent's replies

By September 8, nine employees in the unit alleged in the amended complaint as being appropriate "for the purposes of collective bargaining" had signed cards authorizing the Union to act as their collective-bargaining representative.[15] On September 9, the Union, in writing, informed respondent that "a majority of [respondent's] truck drivers, oil burner

[14] These findings are based on testimony given by Collins and Galullo.

[15] This finding is based on the authorization cards received in evidence as General Counsel's Exhibits 11, 12, and 14 through 20, and the testimony of the employees who signed the cards in question except Robert Chiaro, whose whereabouts were unknown at the time of the trial.

servicemen and installers, mechanics, and helpers have authorized [the] Union to act as their collective bargaining representative," and, in essence, requested that respondent recognize, and bargain with, it as such representative.[16] On September 12, the Union filed a representation petition (Case 1–RC–9178) which was later withdrawn without prejudice.

Upon receipt of the Union's letter,[17] respondent retained counsel and turned the letter over to him. He, in reply, informed the Union, on September 13, that respondent disputed both the Union's majority claim and "the appropriateness of the unit." With respect to the authorization cards, respondent's lawyer stated that they were signed "solely for the purpose of obtaining a representation election * * * and, if not for that purpose, were signed based upon misrepresentations by representatives of your Union as to [their] import." It was further stated in this letter in ac-

[16] There is an apparent variance between the unit set forth in the Union's letter (General Counsel's Exhibit 2, in evidence) and that contained in paragraph 10 of the amended complaint (General Counsel's Exhibit 13, in evidence) which describes the unit as [a]ll employees employed by Respondent * * * including fuel truck drivers, installation men, servicemen, soot men, but excluding salesmen, office clerical employees and supervisors * * *." Respondent raises no issue concerning these seemingly different unit descriptions and concedes in its brief that the unit set forth in the amended complaint "is the same unit originally sought by the Charging Union." In view of this concession, I find that the two documents, i.e., the Union's letter and the General Counsel's amended complaint, in fact describe the same unit. As the unit description set forth in the amended complaint appears to be more artful than that contained in the Union's letter, all subsequent mention of the unit involved will have reference to the former, and, for the reasons set forth in footnote 53, *infra*, will be construed as including the maintenance man.

[17] The letter was received by respondent on September 12.

knowledgement of the Union's filing of its representation petition that respondent would recognize the Union "only" upon its certification by the Board.[18]

As previously mentioned, several employees of respondent attended a meeting at the Union's headquarters on September 13. At this meeting another employee in the unit, the 10th to do so, signed an authorization card.[19]

The following day, September 14, representatives of the Union and respondent met with agents of the Federal and State mediation services. As is usual in such situations, the parties met jointly and separately with the mediators. At one of the joint sessions the Union again requested recognition and bargaining and again respondent refused, stating on this occasion that the unit was inappropriate and that it would recognize the Union if it won a representation election.[20]

In view of respondent's contentions concerning the Union's "majority" and the invalidity of the authorization cards signed by its employees, findings must be made concerning the number of employees in the unit, and the circumstances surrounding the signing of the cards. Concerning the former, it was stipulated that at the time in question here respondent employed 8 servicemen, 4 sootmen, 2 drivers, and 1 maintenance man, a total of 15.[21]

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[18] These findings are based on the testimony of Knell and Grant, respectively respondent's president and secretary, and on the letter written by respondent's lawyer (General Counsel's Exhibit 6, in evidence).

[19] Like the other findings with respect to the signing of authorization cards, this finding is based upon the card, itself (General Counsel's Exhibit 21, in evidence), and the testimony of the employee who signed the card.

[20] These findings are based on the testimony given by Galullo, the Union's business representative, and Grant, respondent's secretary.

[21] In addition to these, respondent employed two office clerks.

As I have already found, 10 employees signed authorization cards. In pertinent part, these cards contain the following recital:

> I hereby authorize the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to represent me for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

Respondent maintains that signatures to all the cards were obtained through misrepresentations sufficient to nullify them. In its brief respondent points particularly to four cards, those signed by William F. Carlson, Felix George Rouleau, James Emery, and Donald MacLellan, as being illustrative of the misrepresentations made by Collins, who solicited signatures on behalf of the Union, or by Galullo, the Union's business representative, to all the employees who signed cards.[22] Accordingly, respondent urges at least that the cards signed by these employees not be counted in determining the Union's majority. In detail, the events surrounding the signing of the cards in question are as follows:

William F. Carlson: Carlson, a serviceman in respondent's employ, received his card in the mail and signed it on September 1, after first reading it. Before

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[22] I do not agree that this is so. Thus, Thomas Yale, a driver testified that Collins merely told him he would receive a card in the mail and that he had no other conversation with Collins before reading and signing his card. Thomas Padden, a sootman, testified that before signing his card Collins told him that "it was a card that the union usually sends out . . . just to give them the authorization to negotiate." John Yale, a serviceman, could remember no conversation at all with Collins about the card which he signed, and Robert Parisi, also a serviceman, gave similar testimony, although he received the card which he signed from Collins.

receiving the card Carlson asked Collins whether he would become a member of the Union if he signed the card. Collins answer was "No." Collins further told Carlson that the cards would enable Galullo to "talk to the company on the empoyees' behalf." Although not so informed by any representative of the Union, Carlson concluded that the card "was only to show * * * the union that there were enough men interested in maybe forming a union"; that the Union would inform respondent of this fact; and that "then it would be up to us to decide whether or not we wanted to vote the union in." [23]

Felix George Rouleau: After receiving his card, but before signing it, Rouleau, a serviceman, asked Collins whether the card "would be binding us to the union in any way." Collins' response was that it would not; that the card was "introductory"; [24] and that Rouleau should "attend a meeting to see what the union had to offer." On the following day, September, 4, Rouleau read the card, signed it, and mailed it to the Union.[25]

James Emery: Emery, a sootman in respondent's employ, signed his card on September 7, after being told by Collins that "he was the last one" and that "everybody else had signed." [26]

Donald MacLellan: With other employees of respondent, MacLellan, a serviceman, attended the meet-

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[23] These findings are based on Carlson's testimony.

[24] In context this word appears to be meaningless.

[25] These findings are based on Rouleau's testimony.

[26] These findings are based on Emery's testimony. Emery also testified that he had decided to sign his card on the day before his conversation with Collins, during the course of which the card was signed. This testimony was elicited from Emery by a leading question from the General Counsel at a time when Emery was his witness. Accordingly, I will give it no weight. *Liberty Coach Company, Inc.*, 128 NLRB 160, 162.

ing held at the Union's headquarters on September 13. Galullo, the Union's business representative, told the assembled employees that among those present two had not signed authorization cards. Galullo, without saying more, then gave a card to MacLellan, who was one of those who had not yet signed. MacLellan signed the card at that time without reading it because, as he put it, there was "general conversation" among the employees "that we wanted to talk to the union, see what they had to offer and cards were more or less permission to talk to the Union." No representative of the Union was present at the time or times of this "general conversation" and although Collins was there he was not the person who told MacLellan that cards had to be signed by employees as a prerequisite to their talking to "the Union." [27]

Collins' discharge

Carl Collins was hired as a driver by respondent on August 19. He started to work the following day. He was discharged on September 17, several hours after respondent received the Union's recognition and bargaining request. At the time of the termination of his employment Collins was told by Grant, respondent's secretary, that he was being discharged because he made "too many mistakes in computing the price of fuel oil." Later that day Grant gave Collins a Connecticut Employment Security Division form, prepared by respondent and signed by Grant in which the "Reason for Unemployment" was stated to be "Inability To Figure Or Compute Prices." [28]

[27] These findings are based on testimony given by MacLellan, Rouleau, and Galullo.

[28] The finding concerning the conversation between Grant and Collins with respect to the reason for Collins' discharge is based on Collins' testimony. Grant's version of this conversation is that he told Collins that he was being discharged for "mak-

On about October 22, respondent offered to reinstate Collins to the job he held at the time of his discharge. Because Collins was then employed elsewhere, he refused respondent's offer.[29]

Prior to his employment by respondent Collins was interviewed by Grant and Thuotte, respondent's dispatcher. At the time Collins was wearing a union button and he told his interviewers that he had been a union member.[30] During this conference the duties of a driver's job were explained to him and Collins was told about "the job training". In the latter connection, Thuotte, as Collins testified, told him that he would "go out with another man for a while to learn the job and that [respondent] invested approximately a year in a man before he would become efficient like they like their employees to be."[31]

Findings concerning Collins' activity in support of the Union have already been made and appear under

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ing too many mistakes in the delivery of oil." Grant's account, as can be seen, differs from Collins' in that it omits any reference to the nature of the "mistakes." This is not a mere semantic distinction. It is material in view of respondent's position, as set forth in its brief, that Collins' discharge was occasioned not only by his errors in computation, but also by his mistakes in other areas. Because I was favorably impressed with Collins' demeanor as a witness and because his testimony as to the conversation in question is corroborated by the Connecticut Employment Security Division form (respondent's Exhibit 11, in evidence), which, as noted, was prepared by respondent and given to Collins on the day of his discharge, I accept Collins' version of the event rather than Grant's.

[29] These findings are based on Collins' testimony.

[30] In its brief respondent concedes that it had knowledge at the time Collins was hired that in the past he had been a member of a union.

[31] Collins' testimony in this regard was substantially corroborated by Thuotte who related that during the interview "It was said that the starting pay was not high because it takes quite a while for a man to be a good oil driver."

the heading "The Union's organizing campaign." The meetings mentioned there, at which Collins related to respondent's employees the advantages of union representation, were held in respondent's shop, the regular work station of the employees who attended, on a Saturday, and on other days of the week. Although Saturday is a regular workday for respondent's employees, none of respondent's supervisors were present in the plant at the time the Saturday meeting was held.

In addition to attending these shop meetings and there explaining the benefits obtainable by the employees through a relationship with the Union, Collins signed an authorization card, distributed others to employees, and engaged in discussions with them concerning the signing of the cards. Like the meetings, these, too, took place on respondent's premises.[32]

As found above, Collins worked for respondent as a driver from August 20, until his discharge on September 12, several hours after respondent's receipt of the Union's bargaining request. At that time, as has also been found, Grant, respondent's secretary, told Collins that he was being discharged because of his computation errors.

Collins did make errors in computing the total price of the oil which he delivered to respondent's customers. Collins made his first error of this nature on the very first day of his employment and continued to make similar errors.

Collins' mathematical deficiencies came to the attention of both Grant and Thuotte, respectively respondent's secretary and dispatcher, during his first week as a driver for respondent. Neither, however, spoke to Collins about this until Grant did so in connection with Collins' discharge on September 12, by which

[32] See, e.g., the testimony of Carlson, Parisi, and Rouleau.

date Collins had been in respondent's employ for more than 3 weeks.[33]

Not only did they not speak to Collins about any of his mistakes,[34] as set forth above, but also neither Grant nor Thuotte before September 12 had determined to take any disciplinary action against Collins because of them. During the morning of that day, however, after the Union's bargaining request had been discussed by Grant and Knell, respondent's president, and had been shown to Thuotte, Thuotte suggested to Grant that they "sit down and talk about [Collins]." They did so and jointly decided to discharge Collins.[35]

One final fact remains for consideration in connection with Collins' dismissal. Although, as Thuotte and Grant both stated, the decision to terminate Collins' employment was theirs jointly and was arrived at after a conference, each gave conflicting testimony with respect to this joint decision. Thus, Thuotte testified

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[33] During Collins' second week of employment Grant informed Padden, a rank-and-file employee, of Collins' computation errors and asked him to tell Collins about them. Padden, however, did not inquire nor did Grant say, what would happen if Collins' arithmetic did not improve. Although Padden relayed the substance of his conversation with Grant to Collins, he could not remember whether he did that before or after Collins' discharge.

[34] In addition to his computation errors, Collins spilled oil on the cellar floor of one of respondent's customers, and on the lawn of another; delivered oil to a customer other than the one it was intended for; gave a customer an invoice which should have been given to another; and on September 10, was unable to make a delivery at the time promised because he could not find the home of the customer who lived in a new section of the city.

[35] These findings are based on testimony given by Grant and Thuotte and the following exhibits received in evidence: General Counsel's Exhibits 3(a) through 3(h) inclusive; and respondent's Exhibits 4 and 5.

that he and Grant arrived at their joint determination to discharge Collins "based on this incident of Gumkowski [36] [and] the mistakes he made in figuring oil tickets." Grant, on the other hand, recited as the grounds for the joint decision the whole gamut of Collins' faults as a driver, including his computation errors, his spillage of oil on a customer's cellar floor, his delivery of oil to a customer who did not order any, his giving a customer an invoice which should have been given to another, and his failure to make a timely delivery of oil to a customer who lived in a new area of the city because he could not find the house.

The events following Collins' discharge

After his discharge Collins and several employees gathered at a local tavern where they talked about Collins' dismissal. In addition, the employees expressed an interest in meeting with Galullo, the Union's representative. Through Collins' efforts such a meeting was arranged for the following evening at the Union's headquarters.[37]

About 10 employees attended this meeting, which was chaired by Galullo. Galullo designated Collins as the Union's steward, discussed with the employees Collins' discharge, respondent's refusal to recognize the Union,[38] and outlined measures which might be

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[36] Gumkowski is the name of the person who owned the house in the new part of the city which Collins could not find in time to make his delivery at the hour promised.

[37] These findings are based on testimony given by Collins and Galullo.

[38] Although Galullo had not yet received respondent's letter informing the Union of its rejection of the Union's request for bargaining, respondent had, apparently earlier that day, posted a notice informing its employees that it would not recognize the Union, a copy of which was given to Galullo at the meeting.

taken, including a strike, to procure Collins' reinstatement and a collective-bargaining contract. In connection with the contract, the employees submitted to Galullo a paper on which was written the benefits they expected the Union to obtain for them through negotiation with the respondent. After considering the various courses which could be pursued, the employees decided to strike for the purposes of obtaining a contract and Collins' reinstatement.[39]

On September 14, almost all the employees who had attended the meeting the previous evening struck and picketed respondent's premises with signs stating "PEMBEK WORKERS ON STRIKE—TEAMSTER'S LOCAL NO. 677" and "WE PROTEST DISCHARGE OF OUR STEWARD—LOCAL NO. 677 TEAMSTERS WATERBURY." The strike was short lived, however, and, as appears below, was discontinued the next day.

Early during the morning of September 15, the striking employees decided among themselves to return to work. The strikers appear to have made this decision because the two servicemen in respondent's employ who were members of the Plumbers Union had not honored their picket line the previous day.

Having decided to terminate their strike Carlson, on behalf of all the employees involved, telephoned Grant, respondent's secretary, to ask whether they "could come in and sit down and talk." Upon Grant's acquiescence, the employees went to respondent's premises where they conferred with Knell, Thuotte, respectively respondent's president and dispatcher, and Grant.[40]

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[39] These findings are based on testimony given by Galullo, Carlson, and Rouleau and General Counsel's Exhibit 10, in evidence.

[40] These findings are based on testimony given by Carlson, Emery, Rouleau, and Grant.

Before the meeting started Knell, respondent's president, called its lawyer for advice as to the proper course which respondent should pursue in the circumstances. Respondent's lawyer, however, was not in his office at the time.[41]

Neither the employees nor respondent's officials who were present at the conference appear to have appointed a particular member to act as spokesman for their respective groups. Representatives of each spoke out at will.

The first to speak was Carlson who stated that the employees were there to discuss their "gripes." To this, Knell, respondent's president, replied, as Emery, one of the employees in attendance, testified, "that he had no idea things had gotten as bad as they were * * * that maybe * * * this was a good thing that it did come out * * * and that * * * we could straighten something out by having this get together." Grant, respondent's secretary, took a less conciliatory line, stating at the outset of the conference that he, too, had "gripes" and "wanted * * * an 8-hour day."

The employees then briefly mentioned some of the things with which they were concerned including the lack of a pension plan, and their desire to have a posted pay scale. There was also a cursory reference to sick and holiday pay. Respondent's representatives made no comment with respect to their employees' complaints, except as to pension and sick pay. Concerning the former, respondent's representatives indicated that respondent had already made inquiries in that area of several insurance companies. As to sick pay Grant stated that such benefits would not be provided where absence from employment was occasioned by the sickness of a member of the employee's family.

[41] These findings are based on Knell's testimony.

No specific proposals were presented by either side and no agreements were reached by respondent and its employees other than one to meet again during the following week. Carlson, one of the employees present, then suggested that they "go in the back shop" and prepare proposals for submission to respondent before the next meeting between the employees and respondent.

While the employees were so engaged, respondent's lawyer returned the call, which Knell had previously made to him. Upon being informed of what had happened respondent's lawyer absolutely forbade further meetings with the employees because, as Knell put it, "having signed the cards, they are considered members of the union, and until this thing is settled one way or the other, you cannot bargain with them no how." Grant and Knell immediately notified the employees that on advice of its lawyer respondent would not meet further with them. Upon being pressed for the reason Grant told the employees that respondent's attorney "has informed us that you have signed cards, and you are automatically represented by the Union." [42]

Later that day, September 15, the employees decided that they no longer desired the Union to represent them. Emery, an employee who participated in the decision, informed Galullo, the Union's business representative, of this, telling him that the employees "didn't want anything to do with the Teamsters Union . : . that they did not want them to represent [the employees; and that they] wanted out because [they] believed [they] were misled into it."

Subsequently, the employees concerned, except

[42] These findings are based on testimony given by Carlson, Emery, Knell, and Grant.

Collins, engaged a lawyer [43] and instructed him to notify the Union formally that they rescinded the authority previously given the Union to represent them for the purpose of collective bargaining. Such notices, on behalf of each employee involved, except Collins, were sent to the Union on October 5.[44]

C. Contentions and concluding findings as to respondent's alleged violation of Section 8(a)(3) of the act

Respondent contends that Collins was discharged because of the mistakes which he had made and that the termination of his employment was not related to his union activity. Moreover, respondent argues that the General Counsel has not established that respondent had knowledge of Collins' participation in the Union's organizing campaign. The General Counsel, in opposition, urges that Collins' discharge was attributable to his efforts on behalf of the Union and that it can be inferred that respondent had knowledge that Collins was so engaged while in its employ.

To be sure, knowledge such as respondent claims it did not have is a necessary ingredient of a violation of Section 8(a)(3) of the Act and must be shown to have existed before an unfair labor practice within the meaning of that section can be said to have occurred. Although there is no direct evidence to establish that respondent had knowledge of Collins' activities on behalf of the Union, it is settled law "that direct knowledge of an employee's concerted or union activities is [not] a *sine qua non* for finding that he has been discharged because of such activities.

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[43] It does not appear that the lawyer chosen by the employees had any relationship with respondent or its attorney.

[44] These findings are based on testimony given by Emery and Carlson and on respondent's Exhibits 7(a) through 7(j) in evidence.

On the contrary, there is well established. * * * precedent that such knowledge may be inferred from the record as a whole." *Wiese Plow Welding Co., Inc.*, 123 NLRB 616, 618.

Considering the "record as a whole", I conclude, as did the Board in *Wiese*, "that such an inference should and must be drawn" in the instant case, particularly in the light of the following factors, most of which were also present in *Wiese:* (1) respondent's knowledge at the time it hired Collins that he had been a member of a union in the past and "was thus a potential source of union organization";[45] (2) the small number of employees in respondent's plan;[46] (3) Collins' proselytizing on behalf of the Union among his coworkers almost from the very start of his employment by respondent, much of which was done on plant premises during working hours; and (4) the timing of Collins' discharge, which occurred abruptly and

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[45] *Texas Industries, Inc.*, 156 NLRB 423, 426.

[46] It will be remembered, in this regard, that exclusive of two office clerks, respondent's entire complement consisted of 15 employees. In *Wiese Plow Welding Co., Inc.*, 123 NLRB 616, 618, on which I place considerable reliance for my finding of "company knowledge" the number of employees involved was "approximately 13." In other cases in which the Board made a similar finding based in part on the fact that the plant in question was small, the total number of employees ranged from 9 to 130. See, e.g., *New French Benzol Cleaners and Laundry, Inc.*, 139 NLRB 1176, 1179, 1190 (9 employees); *Allied Distributing Corporation*, 130 NLRB 1348, 1349, 1350, enfd. 297 F. 2d 679 (C.A. 10) (13 employeees); *Tru-Line Metal Products Company*, 138 NLRB 964, 966, 972, enfd. 324 F. 2d 614 (C.A. 6) (36 employees); *Stokeley Foods, Inc.*, 91 NLRB 1267, 1270, 1277 (75 employees); *Malone Knitting Company*, 152 NLRB 643, 644, 647, enfd. 358 F. 2d 880 (C.A. 1) (80–90 employees); *Quest-Shon Mark Brassiere Co., Inc.*, 80 NLRB 1149, 1150, enfd. 185 F. 2d 285 (C.A. 2) (130 employees).

without prior warning[47] several hours after respondent received the Union's bargaining request.

Having concluded that respondent had knowledge of Collins' activities on behalf of the Union, it must next be determined whether respondent was motivated by antiunion considerations in discharging Collins, as the General Counsel urges, or solely because of his mistakes, as respondent contend. If the former is the case, then, clearly, Collins' discharge violated Section 8(a)(3) of the Act. *N.L.R.B.* v. *Great Eastern Color Lithographic Corporation,* 309 F. 2d 352, 355 (C.A. 2), cert. denied 373 U.S. 950. If the latter, then, equally clearly, respondent's termination of Collins' employment did not constitute an unfair labor practice. *Mitchell Transport, Inc.,* 152 NLRB 122, 123, affd. *sub nom. Hawkins* v. *N.L.R.B.,* 358 F. 2d 281 (C.A. 7).

On the record of this case, respondent's claim that it dismissed Collins because of his mistakes does not appear to be well taken. It seems to me, in this connection, that respondent expected new employees, such as Collins, to make mistakes, else why would Thuotte, respondent's dispatcher, have told Collins when he was hired that respondent "invested approximately a year in a man before he would become efficient." Furthermore, Collins' faults came to respondent's attention during the first week of his employment. He was, nevertheless, permitted to continue working for an

[47] I do not construe the conversation between Grant, respondent's secretary, and Padden concerning Collins' computation errors as constituting an "informal warning" to Collins, as respondent contends in its brief. First, Grant did not tell Padden that disciplinary action would be taken against Collins if he persisted in making such errors. Second, Padden, like Collins, was a rank-and-file employee. Finally, there is no evidence to establish that Padden informed Collins of his conversation with Grant prior to Collins' discharge.

additional period of more than 2 weeks. However, several hours after respondent's receipt of the Union's request for bargaining, which was the culmination of Collins' organizing effort on behalf of the Union among respondent's employees, he was summarily and without prior warning discharged, ostensibly because of the mistakes which he had made.

The timing of Collins' abrupt discharge coming as it did hard on the heels of the Union's recognition request and the relatively long period during which respondent suffered Collins' deficiencies as an employee, lead me to believe that the real reason for Collins' dismissal was his activity on behalf of the Union which had its fruition in the Union's request that respondent bargain with it. In this regard, it has been held that the "abruptness of a discharge and its timing are persuasive evidence as to motivation." *N.L.R.B.* v. *Montgomery Ward & Co.*, 242 F. 2d 497, 502 (C.A. 2), cert. denied 355 U.S. 829. It has been further held that "an employer's tolerance of an employee's shortcomings until he engages in union activity is an indication of discriminatory motivation." *Virginia Metalcrafters, Incorporated*, 158 NLRB No. 90, footnote 3.[48]

Finally, my belief that the assigned reason for Collins' dismissal was pretextual is strengthened by the conflicting testimony given by Grant and Thuotte, respectively respondent's secretary and dispatcher, as to the basis for the joint decision to discharge Collins. In *N.L.R.B.* v. *Radcliffe and Mancke*, 211 F. 2d 309, 314 (C.A. 9) cert. denied 348 U.S 833, the court aptly stated that "the giving of * * * inconsistent * * * reasons by management for the discharges of employees, properly, may be considered by the Board * * * in determining the real motive which actuated the dis-

[48] See also *Nitro Super Market, Inc.*, 161 NLRB No. 46.

charges." To the same effect see *International Furniture Company,* 98 NLRB 674, enfd. 199 F. 2d 648 (C.A. 5).

Accordingly, I conclude that by discharging Collins respondent violated Section 8(a)(3) and (1) of the Act.

D. Contentions and concluding findings as to respondent's alleged violations of Section 8(a)(1) and (5) of the act

The complaint asserts that respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union, by causing its employees to abandon a lawful strike, by bargaining directly with its employees, and by causing its employees to repudiate the Union. Inasmuch as the latter allegations have a substantial bearing upon the refusal to bargain averment, they will be discussed first.

The strike and its abandonment

On September 14, following respondent's rejection of the Union's first request for recognition and its discharge of Collins in violation of Section 8(a)(3) of the Act employees who signed cards authorizing their representation by the Union struck. Their purposes in striking, as I have found, was to compel respondent to enter into a collective-bargaining agreement and to obtain Collins' reinstatement. On the next day, September 15, the employees terminated their strike and returned to work.

The complaint alleges that respondent caused its employees to abandon their strike and that by doing so it violated Section 8(a)(1) and (5) of the Act. I do not agree. I cannot find on the record of this case that the termination of the strike was induced by any conduct on the respondent's part. On the contrary, the evidence establishes conclusively that the employees,

of their own volition, decided to abandon the strike and that this decision was not made because of anything done by respondent, but because two servicemen in respondent's employ refused to honor the picket line established by the striking employees at respondent's premises on September 14.

Accordingly, I conclude that the General Counsel has not sustained his burden of proving by a preponderance of the evidence that respondent violated Section 8(a)(1) and (5) of the Act by causing its employees to abandon their strike as alleged in paragraph 15 in the complaint. I will, therefore, recommend that this paragraph and all relating paragraphs of the complaint be dismissed insofar as they have reference to respondent's causing the abandonment of the strike.

Respondent's direct dealing with its employees and their repudiation of the Union

The General Counsel contends that respondent violated Section 8(a)(1) and (5) of the Act in bypassing Union and bargaining directly with its employees following their return to work after their strike and by causing them to repudiate the Union. Although respondent denies this, it argues by way of avoidance that even if it did commit an unfair labor practice by bargaining directly with its employees that violation was remedied by respondent's refusal to meet further with its employees and the immediate notice to this effect which it gave to its employees. Insofar as the repudiation of the Union is concerned respondent asserts that this was not occasioned by its inducement, but, rather, by the employees' disenchantment with the Union.

Briefly, the facts in connection with this phase of the case, as I have found them, are that upon the termination of their short-lived strike respondent and

the employees who had struck engaged in a mutual "gripe" session. Among the complaints aired by the employees was their concern over the absence of a pension plan and a posted pay scale. They also expressed dissatisfaction with some aspects of their sick and holiday pay.

Although the meeting continued for a substantial period of time, neither respondent nor the employees appointed a spokesman for their respective groups, and the conference was, in general, informal. No proposals were presented by either side and no agreements were made as to matters which would normally be found in a collective-bargaining contract. In connection with the employees' complaints over the lack of a pension plan, however, respondent indicated that it had already started negotiations in that regard with several insurance companies.

At the conclusion of the conference respondent agreed to meet again with the employees during the following week. The employees then went into respondent's shop to prepare proposals for submission to respondent before their next meeting.

Immediately after the meeting respondent's president was advised by its lawyer not to meet further with the employees during the pendency of the Union's representation claim. Respondent's president promptly informed its employees that it would follow its lawyer's advice.

I agree with the General Counsel that respondent's discussion with its employees which embraced such matters as sick and holiday pay, pensions, and posted wages scales constituted individual bargaining in derogation of their right to be represented by the Union and, hence, a violation of the Act. I am convinced, however, that a remedial order is not required insofar as this aspect of the case is concerned.

I am persuaded in this regard by respondent's argument that unfair labor practices committed by respondent in dealing directly with its employees were cured by its immediate discontinuance upon being advised to do so by its lawyer and by its prompt notice to the employees that it would not meet further with them. A Board order could not accomplish more.[49]

A different result is required, however, by the sequel to respondent's direct bargaining with its employees', i.e., their repudiation of the Union. Respondent contends that it did not contribute in any way to their employees' withdrawal from the Union. This argument, however, is not well taken, for in the field of labor management relations law no less than in other areas of jurisprudence "a man is held to intend the foreseeable consequences of his conduct," [50] here, the repudiation of the Union by the employees.

Respondent's conduct which resulted in the "foreseeable consequence" of the Union's repudiation started with its meeting with its employees, at the outset of which they stated that they wanted to discuss their "gripes." To this respondent's president replied that perhaps "we could straighten something out by having this get together." As the meeting progressed respondent's representatives indicated that a pension plan, the absence of which appeared to be of greatest concern to the employees, might be in the offing. Although no agreements were actually reached, hope for employee benefits through further conferences was held out by respondent's promise to meet again with its employees the following week.

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[49] As the Supreme Court stated in this regard, "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348.

[50] *The Radio Officers' Union, etc.* v. *N.L.R.B.*, 347 U.S. 17, 45.

After having thus instilled in its employees the expectation that matters might indeed be straightened out, the employees were informed by respondent that there would be no further meetings because, in the words of its secretary "you have signed cards and you are automatically represented by the Union."

It needs no great imagination to foresee that respondent's entire course of conduct in this regard, including not only the manner in which its individual bargaining with its employees was terminated, but also the violative bargaining itself, and the hope which it engendered for future benefits would result in the employees' rescision of the authority of the Union to act as their bargaining representative. This action was taken by them immediately and formalized in writing some 3 weeks later.

In sum, respondent by bargaining directly with its employees started the chain of events which foreseeably resulted in their repudiation of the Union. Respondent must, therefore, be held responsible for this predictable consequence of its conduct. Accordingly, I conclude that by causing its employees to repudiate the Union respondent violated Section 8(a)(1) of the Act.

Before determining whether, as alleged in the complaint, respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union, preliminary findings must be made concerning the appropriateness of the unit for which the Union sought recognition [51] and as to whether the Union represented a majority of the employees in that unit.[52]

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[51] *Joslin Dry Goods Company*, 118 NLRB 555, 557, 558.

[52] *H. W. Elson Bottling Company*, 155 NLRB 714, 715–716.

The appropriate unit

The complaint, as amended at the trial, asserts that "all employees employed by respondent * * * including fuel truck drivers, installation men, servicemen, soot men, but excluding salesmen, office clerical employees and supervisors" [53] constitute a unit appropriate for collective bargaining.

It is well established that in determining the appropriateness of a unit for collective-bargaining purposes, the prime consideration is the community of interest shared by the employees involved. *E. H. Koester Bakery Co., Inc.,* 136 NLRB 1006, 1009. As further pointed out in *Koester,* the factors "which tend to show the presence or absence of this community of interest" are varied and include such things as the employees' "common experience, duties, wages, hours, and other working conditions." All, *Koester* teaches, must be taken into consideration and evaluated.

I have found that the employees in question are hourly rated. Each has a timecard. All except the maintenance man, wear the same work uniform. All benefit from an insurance program maintained by respondent and enjoy the same vacation and sick leave privileges. All work in respondent's warehouse, except when they are performing duties away from respondent's premises. Finally, insofar as "common experience * * * and working conditions" are concerned, all

[53] Although, as I have found, respondent employs a maintenance man, he is neither specifically included nor excluded in the unit description appearing in the amended complaint. However, in view of the inclusive reference to "all employees," the absence of the term "maintenance man" from the exclusions, and the seeming understanding of the parties that the maintenance man was intended to be included by the General Counsel, the unit description set forth in the amended complaint will be construed as including the maintenance man.

the employees involved share the same restroom and other facilities in the shop.

The main function of the drivers is, as I have found, to deliver fuel oil to respondent's customers. I have also found, however, that for a substantial portion of their time, generally in the summer when there are few deliveries to be made, the drivers assist the servicemen in their work.

Supervision is also a factor to be taken into account in determining whether there is a community of interest among the employees concerned. *L. D. Caulk Company,* 158 NLRB No. 33; *Federal Electric Corporation,* 157 NLRB No. 89. In this regard, there is, as has been found, a considerable amount of common and overlapping direction of the work performed by the employees in question. Thus, respondent's president oversees its "whole operation." Its sales engineer "directs the activities" of the industrial servicemen, and, with assistance from respondent's secretary, assigns work to all servicemen. The drivers, domestic servicemen, and maintenance man are normally supervised by respondent's dispatcher and the sootmen by its secretary, but from time to time respondent's sales engineer also exercises supervision over the sootmen, drivers, and maintenance man. Organizationally, although the dispatcher usually "reports" to respondent's president, he does so, on occasion, to its secretary.

An evaluation of the foregoing factors in my opinion "tends to show the presence * * * of [a] community of interest" among respondent's servicemen, sootmen, drivers, and maintenance man sufficient to warrant their inclusion in a single unit for collective-bargaining purposes.[54] It is respondent's position, however, as set forth in its brief, that to include the serv-

[54] *E. H. Koester Bakery Co., Inc.*, 136 NLRB 1006, 1009.

icemen in a unit which also embraces the other employees in question would be improper because of their special skills, their "lack of interchangeability with other employees" [55] and the coverage of some of them by respondent's contract with the Plumbers Union, which respondent submits "is a bar to these proceedings." For these reasons respondent argues that a unit consisting only of servicemen, excluding those covered by the Plumbers Union contract, "would be more appropriate" than one which also includes other employees.

Considering first, respondent's arguments bottomed upon the contract, it appears that this agreement covers only two of respondent's servicemen. Accordingly, even if this were a representation proceeding,[56] this contract would not operate as a bar, at least insofar as the employees not covered by the contract are concerned. Cf. *N. Sumergrade & Sons,* 121 NLRB 667, 669–670.

Nor does the contract between respondent and the Plumbers Union preclude the placement of the two covered servicemen in a unit which also includes respondent's other employees. The contract is applicable to the two servicemen in question only for a 6-week period in each year during which they install oil burners in buildings under construction. During the rest of the year they do the same kind of work as respondent's other servicemen and are subject to the same working conditions as all other persons in respondent's employ. They are, therefore, dual-func-

[55] This contention appears to be effectively negatived by the assistance afforded the serviceman by the drivers, as pointed out above.

[56] See *Hexton Furniture Company*, 111 NLRB 342, 343–344, which applied contract bar principles to a complaint case alleging violations of Section 8(a)(5) of the Act.

tion employees. As such, regardless of the contract, they may be placed in the same unit with other employees whose interests they share. *Berea Publishing Company,* 140 NLRB 516, 519. In *Denver-Colorado Springs-Pueblo Motor Way,* 129 NLRB 1184, overruled in other respects by *Berea Publishing,* the employee in question was, as are the two servicemen here, covered by a contract with another union. Although the Board noted this factor, it was given no weight in determining the unit placement of the dual-function employee there under consideration.

While I agree with respondent that the servicemen exercise special skills, I do not agree that they should for this reason be set apart for unit purposes from the other employees with whom they share common working conditions and other interests. Cf. *Meramec Mining Company,* 134 NLRB 1675, 1676, in which the Board stated that the unit placement of certain highly skilled technical employees would be determined upon "an analysis of their community of interest," taking into consideration not only their "skills and duties," but also the other usual factors such as "the presence and absence of common supervision, the similarity or disparity of working conditions, the kind of industry, the contact or interchange with other employees, and the organization of the plant."

Respondent's final argument, insofar as this phase of the case is concerned, is that a unit consisting only of servicemen, excluding those covered by its contract with the Plumbers Union "would be more appropriate" than one which also includes other employees. A short, but effective, answer to this is found in *Morand Brothers Beverage Co.,* 91 NLRB 409, 418. There the Board aptly stated that the Act does not require "that the unit for bargaining be the *only* appropriate unit,

or the *ultimate* unit, or the *most* appropriate units; the Act requires only that the unit be 'appropriate'." [57]

Respondent's arguments as to why the servicemen should not be included in a unit for collective bargaining which also includes respondent's other employees being, in my opinion, without merit. I conclude, in view of the sufficiency of their community of interest that respondent's drivers, servicemen, sootmen, and maintenance man constitute an appropriate collective-bargaining unit.

The Union's majority

Having concluded that a unit consisting of respondent's drivers, servicemen, sootmen, and maintenance man is appropriate for collective bargaining, it must next be ascertained whether the Union represented a majority of the employees in this unit. In this regard, it is respondent's contention that the authorization cards on which the union majority claim is based are invalid because of misrepresentation in their procurement.

There were 15 employees in this unit on September 9 and 14, on both of which dates the Union requested recognition. To establish the Union's majority the General Counsel offered 10 cards in evidence. Nine were signed before September and the 10th was signed on September 13.

Although contending that each card was obtained by misrepresentations sufficient to invalidate it, respondent refers specifically to four, those signed by

[57] Although *Morand Brothers* has had a checkered history on enforcement and on remand, the principle enunciated in the text does not appear to have been questioned. See *Morand Brothers Beverage Co.*, v. *N.L.R.B.*, 190 F. 2d 576 (C.A. 7), enfg. in part and remanding 91 NLRB 409, and 204 F. 2d 529, enfg. 99 NLRB 1448, cert. denied 346 U.S. 909; rehearing denied 346 U.S. 940.

Carlson, Rouleau, Emery, and MacLellan, as being illustrative of all,[58] and urges that these four, at least, be not counted in determining the Union's majority. If this were done, it would, of course, result in the Union's representation of only six employees in the unit, less than a majority.

The cards unequivocally authorized the Union to "represent" those who signed "for the purposes of collective bargaining." No other stated purpose appeared on the cards. "An authenticated signature on an authorization card [like those signed by the employees here] is *prima facie* evidence that it is what it purports to be—a designation of the Union as the employee's bargaining representative, unless it is shown that the employee was induced to sign the card through beguilement or serious misstatement of fact." [59] This is so, "irrespective of what the employee thought * * * as long as the solicitor does not make a significant false statement * * *" *South Bay Daily Breeze*. 160 NLRB No. 145.

Considering the disputed cards in the light of these principles, I find, insofar as Carlson is concerned, that he was truthfully and in accordance with the text of the card told by Collins, who solicited cards on behalf of the Union, in response to an inquiry, that he would not become a member of the Union by signing the card and that the cards would authorize the Union to "talk to the company on [his] behalf." Collins told Rouleau substantially the same thing and added a suggestion that Rouleau attend a union meet-

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[58] See footnote 22 for my conclusion with respect to this.

[59] To undercut the validity of an authorization card "which [as in this case] plainly designates a union as bargaining agent, the employer can prevail only with clear evidence of misrepresentation." *Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B.*, ——— F. 2d ——, 63 LRRM 2581, 2584 (C.A.D.C.).

ing. No statements as to the card's purport were made to MacLellan. He was merely asked by Galullo, the Union's business representative, to sign the card, and he did so.

The impressions harbored by Carlson and MacLellan as to the significance of the cards were their own and were not engendered by any statement made by Collins, Galullo, or any other representative of the Union. Thus, Carlson testified that it was his "own conclusion" that the purpose of the card was to indicate the signer's interest in "forming a union"; that the Union would so notify respondent; and that then the employees could decide "whether or not [they] wanted to vote the union in." MacLellan formed a completely different impression as to the meaning of the cards based upon, as he testified, "general conversation" among the employees.[60] He concluded that employees had to sign cards as a prerequisite to their talking to "the Union."

As *South Bay Daily Breeze* directs, however, I may not rely on these thoughts as to the meaning of the cards in determining their validity. I may only consider whether there is clear evidence that the employees were "induced to sign * * * through beguilement or serious misstatement of fact." Finding neither present I conclude that there was no impropriety in the Union's procurement of authorization cards from Carlson, Rouleau, and MacLellan. They will, therefore, be counted in determining whether the Union represented a majority of the employees in the unit.

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[60] Although Collins was present when this "general conversation" took place, MacLellan admitted that Collins did not say anything which contributed to the establishment of his impression.

A different conclusion is required with respect to Emery's card. By September 7, the day on which Emery signed his card, only six other employees in the unit had done so.[61] Notwithstanding this, Collins told Emery on that day that all the other employees had signed cards and that he was the only one who had not. This misrepresentation was serious enough to invalidate Emery's card. *Pizza Products Corporation,* 153 NLRB 1265, 1266, 1271, enfd. as modified in other respects, 369 F. 2d 431 (C.A. 6). It will, therefore, not be considered in ascertaining the Union's majority status.

Adding the cards signed by Carlson, Rouleau, and MacLellan to the six other cards signed by employees in the unit,[62] all of which I find to be valid, the Union represented eight employees in the unit on September 9, the date of its first request for bargaining and nine on September 14, the date on which it again requested recognition. Inasmuch as there were a total of 15 employees in the unit on those dates, I conclude that the Union represented a majority on both occasions.

Respondent's refusal to bargain with the Union

In justification of its refusal to bargain with the Union respondent makes two basic arguments. The first is that the unit for which the Union sought recognition is inappropriate. The second is that in good faith it doubted, at the time of the bargaining requests, that the Union represented a majority. Accordingly, respondent argues in its brief, it had sufficient reason "to refuse recognition and to demand that the Board processes be followed to, first, determine

[61] I am including Padden's card in this figure, although it, too, was signed on September 7.

[62] These consist of cards signed by Collins, Robert Chiaro, Thomas Yale, Padden, John Yale, and Parisi.

what the appropriate unit was, and, second, by the use of the Board's election procedures to determine whether or not the employees in such an appropriate unit desired to be represented by the Union." Countering the General Counsel's contention that respondent's refusal to recognize and bargain with the Union was not based upon its foregoing claims but upon its determination to gain time within which to destroy the Union's majority status, respondent also asserts in its brief "that absolutely no independent 8(a)(1) violations have been proved by substantial evidence" and that there "was no flagrant violation of the Act."

Respondent's argument concerning the appropriateness of the unit is without merit. It is well settled that an employer acts "at its peril" in refusing to bargain on the ground that the unit in which the Union seeks recognition is inappropriate if it is concluded, as in this case, that the unit is appropriate. *Tom Thumb Stores, Inc.*, 123 NLRB 833, 835. See also *Hoskins Ready-Mix Concrete, Inc.*, 161 NLRB No. 132.

Respondent's other arguments in defense of its refusal to bargain with the Union are likewise without merit. Where an employer, in good faith genuinely doubts that a union seeking recognition represents a majority of the employees involved he may refuse to recognize the union until its claim is established by an election. An employer, however, is not entitled to an election where he engages in serious unfair labor practices in order "to gain time within which to undermine the Union's support" and then asserts a good-faith doubt as to the union's majority. In such a case the election procedure will be bypassed and the employer will be required to bargain with the union provided the unit involved is appropriate and the union in fact represented a majority of the employees when it requested recognition. This is the teaching of *Joy Silk*

Mills, Inc., 85 NLRB 1263, enfd. as modified in other respects 185 F.2d 732 (C.A.D.C.), cert. denied 341 U.S. 914, and of countless subsequent cases.

The facts of this case, I am convinced, require the application of the *Joy Silk* rationale. Respondent's serious unfair labor practices, including the discharge of Collins in violation of Section 8(a)(3) and (1), its direct bargaining with its employees, and its having caused them to repudiate the Union, in violation of Section 8(a)(1) of the Act, belie respondent's professed good-faith doubt as to the Union's majority.[63] I, therefore, reject respondent's contentions in this regard, and find, in view of respondent's serious violations of Section 8(a)(1) and (3) of the Act, that its refusal to bargain with the Union was in bad faith, and was designed to gain time in which to destroy the Union's status as its employees' collective-bargaining representative.

Accordingly, having found that the unit for which the Union requested recognition was appropriate for purposes of collective bargaining and that the Union represented a majority of the employees in that unit when it requested respondent to bargain with it, I conclude that respondent's rejection of those requests and its refusal to bargain with the Union constituted violations of Section 8(a)(5) and (1) of the Act.

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[63] Even if Collins' violative discharge had been respondent's only unfair labor practice, my conclusion with respect to this phase of the case would not be different. See *Dee's of New Jersey, Inc.*, 161 NLRB No. 18, where the Board stated in a related context that "a discriminatory denial of employment [is] the kind of conduct which is most likely to impress upon employees the disfavor with which the employer regards his employees' organizing activities" and that, therefore, "a serious view must be taken" of such a violation.

IV. The effect of the unfair labor practices upon commerce

Respondent's activities set forth in section III, above, occurring in connection with its operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that respondent engaged in the unfair labor practices set forth above, my Recommended Order will direct respondent to cease and desist therefrom and to take such affirmative action as will effectuate the purposes of the Act.[64] In this connection, as respondent has already offered reinstatement to Collins, respondent will be required only to make him whole for loss of earnings he may have suffered by the discrimination practiced against him. Any back pay found to be due to Collins shall be computed in accordance with the formula set forth in *F. W. Woolworth Company,* 90 NLRB 289, and shall include interest in the amount and manner provided for in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

Contending that the strike which took place on September 14, was an unfair labor practice strike, the General Counsel urges that the order to be entered herein provide that the strikers "be made whole for the consequences of Respondent's actions." While I agree that the work stoppage in qestion was an unfair labor practice strike,[65] there is no evidence that the

[64] Having concluded that respondent has already cured the unfair labor practices involved in its direct bargaining with its employees, I will not recommend the entry of an order remedying this violation. See page 15, *supra*, for my reasons.

[65] Mitchell Concrete Products Co., Inc., 137 NLRB 504, 506.

strikers were refused reinstatement when they decided to return to work. Absent this, as is well settled, a "make whole" remedy, insofar as they are concerned, is unwarranted.

In view of the repudiation of the Union by respondent's employees, respondent urges that the entry of a bargaining order would completely disregard the right of those employees, as set forth in Section 7 of the Act, to refrain from collective bargaining. Respondent, however, as I have found, is responsible for its employees' defection from the Union. Were respondent to be permitted to continue its refusal to bargain with the Union because it does not now represent a majority of its employees would be to permit respondent to profit from its own wrong. As the Supreme Court stated in *Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678, 687, which involved a situation substantially similar to the one presented here:

> Petitioner cannot, as justification for its refusal to bargain with the Union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will.

See also, to the same effect, *Franks Bros. Company* E. N.L.R.B., 321 U.S. 702, 703–705.

Accordingly, my Recommended Order will contain a provision requiring respondent to bargain with the Union. It will also contain, in view of the nature and extent of the unfair labor practices engaged in by respondent, broad cease-and-desist provisions.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By bargaining directly with its employees and by causing them to repudiate the Union and to rescind the authority of the Union to represent them for purposes of collective bargaining, as set forth in section III hereof, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By discharging Carl Collins because of his membership in, and activities on behalf of, the Union, thereby discouraging such conduct, respondent has engade in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. All employees employed by respondent, including fuel truck drivers, installation men, servicemen, power cleaners, also known as sootmen, and maintenance men, excluding salesmen, office clerical employees and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times material herein the Union has represented a majority of the employees in the unit set forth in Conclusion of Law 5, above.

7. By failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of the employees in the unit set forth in Conclusion of Law 5, above, respondent has engaged in

and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. Respondent did not engage in unfair labor practices in the manner set forth in those portions of paragraph 15 and related paragraphs of the complaint insofar as those paragraphs make reference to respondent's having caused its employees to abandon a lawful strike.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record in this case, I hereby issue the following:

RECOMMENDED ORDER

The Pembek Oil Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or inducing employees to repudiate International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization.

(b) Causing or inducing employees to rescind the authority of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization, to represent them for purposes of collective bargaining.

(c) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other labor organization, by discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(d) Failing or refusing to recognize or bargain collectively concerning rates of pay, wages, hours, or other terms or conditions of employment with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No.

677, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All employees employed by respondent, including fuel truck drivers, installation men, servicemen, power cleaners, also known as sootmen, and maintenance men, excluding salesmen, office clerical employees and supervisors as defined in the Act.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act, as amended, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8(a)(3) of the Act.

2. Take the following affirmative action which, it is found, will effectuate the policies of the National Labor Relations Act, as amended:

(a) Make Carl Collins whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records or reports, and all other records necessary or useful to detemine the amount of backpay due under the terms of this Recommended Order.

(c) Upon request, recognize and bargain with International Brotherhood of Teamsters, Chauffeurs, Ware-

housemen and Helpers of America, Local Union No. 677, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, or other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Post, at its premises copies of the attached notice marked "Appendix A."[66] Copies of said notice, to be furnished by the Regional Director for Region 1 of the National Labor Relations Board, after being signed by an authorized representative of respondent, shall be posted by respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from receipt of this Decision, what steps respondent has taken to comply herewith.[67]

It is further order, That the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

Dated at Washington, D.C.

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[66] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[67] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Appendix A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

After a trial in which both sides had the opportunity to present their evidence it has been found that we violated the law by committing unfair labor practices and we have been ordered to post this notice and to keep the promises that we make in this notice.

We will not cause, induce, request, or encourage you to repudiate, withdraw, or resign, from International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union.

We will not cause, induce, request, or encourage you to cancel, or seek the return of, any card you may have signed naming, authorizing, or designating International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, local Union No. 677, or any other union, to act as your collective-bargaining representative.

We will not discourage union activity or membership in International Brotherhood of Teamsters, Chauffeurs, Warehouse and Helpers of America, Local Union No. 677, or any other union, by discriminating against you if you choose to engage in union activity, or if you join International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677, or any other union.

We will not in any other way interfere with, restrain, or coerce you in the exercise of any rights guaranteed to you by the National Labor Relations Act. In this connection, we will respect your rights to self-organization, to form, join, or assist any union, to bargain collectively through any union or representative of your choice as to wages, hours of work, and any other term or condition of employment. You also have the right, which we also will respect, to refrain from doing so.

We will not discriminate against any employees for engaging in union activity or for joining any union. Since it has been found that we did so when we fired Carl Collins, to whom we have already offered full reinstatement to his old job, we will pay him for any loss he suffered because we fired him.

Appendix B

Case 1–CA–5652

THE PEMBEK OIL CORPORATION
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 677

It is ordered, That the stenographic transcript of this proceeding be, and the same hereby is, corrected as indicated below:

Page	*Line*	*From*	*To*
5	2	Procedures	Procedure
19	20	concludes	constitutes
36	1	months	men
129	24	the man	the first man
149	23	overruled	overrule
150	25	foundation	date
196	9	would	will
196	21–22	allies the discharge to an unfair labor practice charge	as well as the discharge as an unfair labor practice
197	7	admit for	admit it was for
207	14	I	he
238	15	main	mail
245	2	is entirely	is not entirely
264	22	as	ask
267	9	in areas	in these areas
274	20	fact	fast
340	4	say necessarily	say is necessary
344	3–4	evidence that maybe any	evidence—maybe my
398	3	will have	will not have
400	20	made up of this employment	were made up of these employees
426	16	wl	21
451	11	my doing	my not doing
452	11	work	word

Dated: Washington, D.C.

U.S. GOVERNMENT PRINTING OFFICE: 1969

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 598

ATLAS ENGINE WORKS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. On July 15, 1965, a representative of International Brotherhood of Teamsters' Local Union No. 20, advised Company Personnel Director Warner by phone that the Union represented a majority of the Company's employees and requested a meeting for collective bargaining (Pet. App. 8a). Warner refused recognition, stating "that there were established procedures" by which the Union could petition for a Board election (Pet. App. 8a). The same day, the Union representative sent the Company a letter in

which he requested recognition and negotiations and asserted that the Union had authorization from a majority of the employees, and further offered "to submit the authorization cards signed by your employees to an impartial person for examination and count" (Pet. App. 8a). The Company by letter acknowledged the Union's majority claim but asserted that its validity could be determined by "a procedure established by law," a Board "secret ballot representation election" (Pet. App. 8a-9a).

On July 21, the Union filed a petition for a Board election (Pet. App. 41a), and one was scheduled for August 6. However, in the intervening period the Company engaged in an extensive program of restraint and coercion, including threats of reprisal, promises of benefit, coercive interrogation, and illegal restraints on union solicitation and literature distribution (Pet. App. 19a-21a, 22a-39a). The Union lost the election, 81-67 (Pet. App. 6a, n. 2).

2. The Board found that the Company's activities during the election campaign had violated Section 8(a)(1) of the Act and, accordingly, set the election aside (Pet. App. 4a, 62a-63a). It considered and rejected Company challenges to authorization cards—*inter alia*, that certain of the cards were obtained under the misrepresentation that they would be used only for the purpose of securing a Board election—and found that the Union had valid authorization cards from a majority of the employees when it requested recognition.[1] (Pet. App. 43a-49a). On the

[1] The Board found that, at that time, the Union had obtained signed authorization cards from 87 of the Company's 169

basis of the Company's extensive unfair labor practices and failure to respond to the Union's offer to submit the cards to an impartial third-party check, the Board inferred that the Company had declined recognition, not because of a good faith doubt as to the Union's majority status, but in order to gain time to undermine the Union (Pet. App. 59a-61a).[2] Accordingly, the Board concluded that by refusing to bargain with the Union the Company violated Section 8(a)(5) and (1) of the Act (Pet. App. 61a). The Board ordered the Company to cease and desist from its unfair labor practice conduct, and to bargain, upon request, with the Union (Pet. App. 64a-66a).

The court of appeals found that the Board's findings were supported by substantial evidence, and enforced its order (Pet. App. 1a-3a).

3. The first question presented challenges the Board's position that where an authorization card unambiguously designates the Union as bargaining agent it will be invalidated only if the signer was coerced or told that the card's sole purpose was to secure a Board election, *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F.2d 917 (C.A. 6). This issue was raised in three cases in which petitions for certiorari

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employees (Pet. App. 58a-59a). By the card, the signer accepted "membership" in the Union and authorized the Union "to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of employment" (Pet. App. 1a).

[2] The court below, in affirming the Board, also noted that "the Company expressed no doubts as to the Union's majority status" (Pet. App. 2a).

were denied last Term. *National Labor Relations Board* v. *Crawford Mfg. Co.*, No. 1050, 390 U.S. 1028; *Preston Products Co.* v. *National Labor Relations Board*, No. 1367, 392 U.S. 906; *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, No. 1324, 392 U.S. 908. Although this issue is related to, it is not the same as, that on which the Board has petitioned in *National Labor Relations Board* v. *Gissel Packing Co., et al.*, No. 573, this Term. There are no special circumstances to distinguish this case from those of last Term on the *Cumberland Shoe* issue; thus, despite the continuing conflict in the circuits on this question, the Board sees no reason why review of the issue is any more warranted than it was last Term.

The second question presented is whether the Board and court properly concluded that the Company lacked a good faith doubt as to the Union's majority status, as shown by the authorization cards. Since the Board acted, in part, on the basis of an inference drawn from the Company's unfair labor practices, this case presents the same issue as *Gissel Packing*, *supra*, where the Court of Appeals for the Fourth Circuit held that an employer's refusal to recognize a union must always be deemed to have been prompted by a good faith doubt as to majority status where the union's claim rests on authorization cards alone. Accordingly, the Court may wish to defer ruling on the present petition until it disposes of the Board's petition in No. 573. The Board believes, however, that there was ample evidentiary support for its conclu-

sion,[3] and that the action of the Sixth Circuit in enforcing its order, which was in accord with the principle ordinarily applied in the courts of appeals, was correct.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

OCTOBER 1968.

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[3] The Company's factual contentions (Pet. 2-3) do not withstand analysis. The Company never cited its past experience with other unions as a reason for declining Union recognition; and notwithstanding its instructions to its supervisors, it was found to have engaged in numerous unfair labor practices.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 906

THRIFT DRUG COMPANY OF PENNSYLVANIA,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. On August 24, 1966, the Retail Clerks Union, which had obtained union authorization cards from 10 out of the 15 employees in the unit, requested recognition as the representative of the employees at petitioner's Kenosha, Wisconsin, store (Pet. App. 10a). Petitioner replied that it doubted whether the Union represented a majority of employees, but agreed to a Board election (Pet. App. 11a). However, in the period preceding the election the Com-

pany engaged in an extensive program of restraint and coercion, which included interrogating employees about their union activities, threatening them with reprisals if they selected a union representative, and promising them benefits if they rejected the union (Pet. App. 28a-33a). The union lost the election by a single vote, 8 to 7 (Pet. App. 11a).

The Board found that the Company's conduct during the election campaign violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), and warranted setting the election aside (Pet. App. 42a-43a, 40a-41a). Having considered and rejected Company challenges to the authorization cards, including the contention that certain of the cards were obtained under the misrepresentation that they would be used only for the purpose of securing a Board election (Pet. App. 19a-28a), the Board also found that the union had valid authorization cards from a majority of the employees when it requested recognition (Pet. App. 28a). In view of the Company's extensive unfair labor practices, the Board concluded that its refusal to recognize and bargain with the union was not motivated by a good faith doubt as to the union's majority status (Pet. App. 36a-38a), but violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 41a, 43a). The Board ordered the Company to cease and desist from the unfair labor practices found, and to bargain with the union upon its request (Pet. App. 45a-47a).

The court of appeals sustained the Board's findings, and enforced its order (Pet. App. 1a-6a).

2. The second and third questions in the petition do not warrant review by this Court. The former challenges the Board's position that, where an authorization card unambiguously designates the union as bargaining agent (as did the cards here), it will be invalidated only if the signer was coerced or it was represented to him that the card's sole purpose was to secure a Board election. *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F. 2d 917 (C.A. 6). This issue was raised in three cases in which petitions for certiorari were denied last Term. *National Labor Relations Board* v. *Crawford Mfg. Co.*, No. 1050, 390 U.S. 1028; *Preston Products Co.* v. *National Labor Relations Board*, No. 1367, 392 U.S. 906; *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, No. 1324, 392 U.S. 908. As in *Atlas Engine Works* v. *National Labor Relations Board*, No. 598, this Term (Memorandum for the respondent, pp. 3-4), the Board sees no reason why review of this issue is any more warranted now than it was last Term. The third question, challenging the admittance of two authorization cards into evidence without authentication by the signer or a witness, concerns a matter of limited significance. Moreover, as the court below pointed out (Pet. App. 3a-4a n. 3), the question is academic; exclusion of the two cards thus challenged would not deprive the Union of its majority.

The remaining questions, however, raise issues similar to those in *National Labor Relations Board* v. *Gissel Packing Co.*, No. 573, this Term; *Food Store*

Employees Union, Local No. 347 v. *Gissel Packing Co.*, No. 691, this Term; and the *Sinclair Company* v. *National Labor Relations Board*, No. 585, this Term, in which this Court has granted certiorari. Thus, the Board found as a fact, and the court below agreed, that the Company's refusal to recognize and bargain with the union was motivated not by a mistrust of authorization cards, as the Company claimed, but by a desire "to defeat unionization regardless of the wishes of the employees and completely without regard to the law" (Pet. App. 6a), as shown by its subsequent unfair labor practices. Under the Fourth Circuit ruling in *Gissel, supra*, it is doubtful that the Board's finding would have been deemed sufficient to support its conclusion.

Although the Board acknowledges that the correctness of the decision below will be governed in this respect by this Court's decision in the above cases, and that the issues involved have the importance warranting a grant of certiorari, it believes that these issues will be adequately presented by the cases already set for argument, and that there are no special circumstances in this case warranting separate consideration.

Accordingly, it suggests that the Court should defer ruling on the present petition until it decides Nos. 347, 691, and 585.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

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JANUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 330820 423

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1213

LOU DE YOUNG'S MARKET BASKET, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. On December 8, 1964, Local 20, Retail Clerks International Association, AFL–CIO, began soliciting authorization cards at petitioner's Grand Rapids store (Pet. App. 35). The Company responded with an anti-union campaign which included threats of reprisal and surveillance, coercive interrogation, restraints on union solicitation, and the discharge of three employees for their union activities (Pet. App. 16–21).

By December 16, the Union had obtained signed authorization cards from a majority of the employees (Pet. App. 23, n. 8); it approached the Company's vice-president, orally requested recognition, and offered the authorization cards for examination (Pet.

347-711—69

App. 40). The vice-president refused to discuss the request and threatened to have the Union representative ejected from the premises if he persisted (Pet. App. 40–41). Later the same day, the vice-president threatened an employee with reprisals should the union come in (Pet. App. 41).

The Union also wrote a letter to the Company on December 16, confirming its request. Having received no reply by December 21, the Union filed a representation petition with the Board. On December 22, the Company rejected the Union's claim of majority representation, but offered to cooperate in arranging for an election (Pet. App. 41).

2. The Board found that the Company's anti-union campaign violated Sections 8(a) (1) and (3) of the Act (Pet. App. 17–21) and that the Company had violated Sections 8(a) (5) and (1) of the Act by its December 16 denial of recognition, since the Union then possessed valid authorization cards from a majority of the employees in an appropriate unit, and the Company's "refusal was not motivated by a good-faith doubt of the Union's majority status inasmuch as there is clear evidence of unlawful efforts, both before and after the refusal, to thwart the employees' union activities and to gain time in which to dissipate that majority" (Pet. App. 28–29). The Board ordered the Company to cease and desist from its unfair labor practices, to reinstate the discriminatorily discharged employees with backpay, and to bargain, upon request, with the Union (Pet. App. 29–31).

The court of appeals sustained the Board's findings and enforced its order in full. The court stated: "Violations of Section 8(a)(1) of the Act may indicate that an employer's assertions of good faith doubt are spurious [citation omitted], especially where such violations are of the 'flagrantly coercive' type, or where an employer continues to commit unfair labor practices after a bargaining demand has been made" (Pet. App. 45–46).

3. But for the similarity to cases now submitted and awaiting decision in this Court, *National Labor Relations Board* v. *Gissel Packing Co.*, No. 573; *Food Store Employees Union, Local No. 347* v. *Gissel Packing Co.*, No. 691; and *The Sinclair Company* v. *National Labor Relations Board*, No. 585, the petition presents no questions warranting review by this Court. Thus, the second question assigned simply challenges a factual finding made by the Board and sustained by the court of appeals that the refusal to bargain occurred on December 16 (Pet. App. 21–22, 45, n. 6). And the fourth question assigned ignores the Board's finding, also sustained below, that the Company's refusal to recognize the Union was based not on any doubt about the appropriateness of the unit, but on a desire to undermine the Union (Pet. App. 21–22, 44–45). In any event, the appropriateness of a particular bargaining unit is usually a legal issue, so that an employer's erroneous belief, even in good faith, affords no defense to a refusal to bargain charge. See *National Labor Relations Board* v. *Bardahl Oil Co.*, 399 F. 2d 365, 368–370 (C.A. 8), and cases cited therein.

The Board acknowledges that the opinions below do rest on the proposition, challenged in the pending cases, that an employer may be ordered to bargain with a union whose majority status is evidenced by authorization cards if it is found that his refusal to recognize and bargain with the union was motivated, not in good faith by any doubt as to its majority, but by a desire "to thwart the employees' union activities and to gain time in which to dissipate [the union's] majority" (Pet. App. 28–29). Thus, it is doubtful that the Board's finding would have been sustained under the Fourth Circuit ruling in *Gissel, supra.* However, the Board believes that these issues have been adequately presented in those cases and that there are no special circumstances in this case warranting separate consideration.

Accordingly, the Board suggests that the Court should defer ruling on the present petition until it decides Nos. 573, 691, and 585.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT, U. S.

MAY 15 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1968

No. 1273

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

THE PEMBEK OIL CORPORATION

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM J. LARKIN, 2d.
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In the Supreme Court of the United States

October Term, 1968

No. 1273

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

THE PEMBEK OIL CORPORATION
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Respondent files this brief in support of its position that this matter should not be reviewed by this Court.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The only question presented for consideration by this Court is the remedy as to whether or not the Respondent should be required to bargain with the Charging Union[1], concerning wages, hours and other conditions of employment of its employees who had abandoned the Union.

STATEMENT OF THE CASE

Pursuant to Rule 40, the Respondent desires to add cer-

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1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union #677 (hereinafter referred to as the "Union")

tain omissions to the factual setting as set forth in the Petitioner's brief.

At the outset it should be borne in mind that, other than the obtaining of the signature cards by Carl Collins, all of the events which not only encompassed the two unfair labor practice charges of 8 (a) (1) and (3), (29 USC 158(a)(1)&(3) but also the strike and repudiation of the strike, occurred within a 4-day period between Monday, September 12, and Thursday, September 15, 1966.

It was on Monday, September 12, that the Respondent received the bargaining demand and also fired Carl Collins. It was on Tuesday, September 13, that the Union held its first and only meeting of employees in Waterbury, Connecticut, at which time the employees who attended were for the first time confronted by the Union Business Representative Galullo, who told them that, if they failed to support the strike which was designed to force the reemployment of Collins, as well as the recognition of the Union, he would have nothing more to do with them (Tr. p. 265, App. p. 13A).[2]

On the following day, Wednesday, September 14, some of the employees formed a picket line while others, including the members of the Plumbers & Pipefitters Union, Local 21, worked. It was also on this date that for the first time Company and Union representatives met along with Federal and State Mediators in an effort to dissolve the strike. This meeting was unsuccessful in this regard.

After the meeting Mr. Galullo again admonished the strikers that, if they abandoned the strike and abondoned Carl Collins, he would have no more to do with them (Tr. p. 232 App.

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2. Reference App. p. are to appendix to this brief.

p. 8a). (Tr. P. 251, App. P. 12a) (Tr. P. 304 lines 7-10) app. P. 16a). Later that evening Rouleau, who appears to have been an employee with leadership, ascertained that the members of the Plumbers Union were not going to honor the strike or the picket line (Tr. p. 324, App. p. 19a), and he thereupon called other employees advising that he was going to abandon the strike, which meant abandoning the Union, and return to work the following morning (Tr. p. 324, App. p. 19a).

By agreement employees met at a restaurant near the Company's premises and agreed to go back to work if the Company would allow them to do so (Tr. p. 268, App. p. 14a). There is no question whatsoever that by this maneuver they thereupon abandoned, rejected and disavowed the Union, so that the later meeting with the Company had no bearing on their subsequent attempt to resign from the Union. Upon being advised, in answer to their question by telephone, that they were free to return to work, they did so on Thursday, September 15 (Tr. p. 268 App. p. 14a). After entering the Company premises they engaged in discussion with Company representatives, which discussion was general in tone and which discussion broke up on the premise that the employees would make specific suggestions to be presented at a later date.

The Company at this point sought legal advice as to its rights in dealing with the employees in the face of not only a demand for recognition but a petition for an election. They received advice that the National Labor Relations Board had a doctrine known as the Midwest Piping Doctrine, **Midwest Piping and Supply Co., Inc.**, 63 NLRB 1060, which provided in effect that when there was a representation question pending it was an unfair labor practice for the Company to bargain with its employees, collectively or individually. The Company thereupon advised the employees that it was against the law for them to bargain with the Union.

It now appears that, by telling the employees that it was against the law and refusing to bargain with them further, the Respondent violated the law, which amounts to a "damned if you do and damned if you don't result." See Medina, J. in **The Schwarzenbach-Huber Co. National Labor Relations Board** (CA. 2) F. 2d. ; slip opinion page 1368 (App. p. 43a).

After the employees were told by the Company that it was illegal for the Company to talk to them while a representation question was pending, the employees endeavored to ascertain what their rights were, as well as their legal position regarding the Union (Tr. p. 227, App. p. 3a). Their efforts to ascertain these facts illustrate vividly that the rank and file employee, no matter how well educated, has absolutely no knowledge of the whys and wherefores of the labor-management relations, and particularly what an authorization card means, practically, legally or any other way. They attempted to contact and did contact a representative of the Connecticut Board of Mediation and Arbitration, who had been present at the attempted strike settlement session on the preceding day, and obtained no information from him (Tr. p. 229, App. p. 4a). They received no answers to their questions from Mr. Galullo, the Union Business Agent (Tr. p. 230, App. p. 5a) (Tr. 269 App. p. 14a) and thereafter attempted to get a definitive answer from the National Labor Relations Board itself; that is, what effect did their cards have (Tr. p. 229, App. p. 5a); again, no answers, uncertainty and frustration. The fact that thereafter they sought their own legal advice and made demand for the return of their cards is an anticlimax (Tr. p. 233 App. p. 8a).

The important point to be considered in this Court's decision as to whether the Board's remedy of bargaining should be adopted is that all of this illustrates that these men had no conception whatsoever that these cards would be used in the

manner in which the Board is now attempting to use them. They did not understand their import, and obviously they did not intend that the result the Board is seeking would come about.

The record repeatedly illustrates this uncertainty concerning the legal consequences of the cards and their use to force the Union on them; Employee William F. Carlson was told by the Union Organizer, "by the signature of the card it didn't mean we were members of the Union" (Tr. p. 239, App. p. 11a); Employee Donald MacLellan testified, "I was just told about what seemed to be assumed among the employees that these cards authorized us more or less to talk to the Union to see what they had to offer" (Tr. p. 301, lines 17-20, App. p. 16a); and Employee Felix George Rouleau testified, " I asked Collins if this card we would be sending in would be binding us to the Union in any way, and he informed me that it wouldn't" (Tr. p. 320, lines 1-3, App. p. 18a) . . . ." "This card was not to be binding to me in any way, binding me to the union in any way" (Tr. p. 322, lines 7-8, App. p. 18a).

ARGUMENT

The Petitioner seeks to have the instant case held until this Court renders its decisions in **National Labor Relations Board v. Gissel Packing Co.** #573 and **The Sinclair Co. v. National Labor Relations Board** #585. The Respondent does not agree that the factual situation and background leading up to the Board's order to bargain with the Union in those cases is comparable to the factual situations herein.

In **Gissel,** 157 NLRB 1065 at 1081, the Trial Examiner found that during the period from September 1964 to April 1965 **Gissel** engaged in threats, interrogation, intimidation, surveillance of Union meetings and discharges, whereas in the instant case, as has been pointed out above, at the time of the

refusal to bargain, September 13, 1966 (G.C. Ex. 6, Petitioner's Appendix C, pp. 40a-41a), the only unfair labor practice committed by the Respondent was the discharge of Carl Collins, which the Trial Examiner found to be discriminatory.

Likewise in **The Sinclair Co.,** 164 NLRB #49, the Board found that from June, 1965, until December 9, 1965, when the Union lost the election the employer had engaged in an extensive anti-Union campaign which was violative of Section 8 (a) (1) of the Act. There is therefore, a decided distinction between The Sinclair Co. and the instant case.

The Petitioner further relies heavily on this Court's decision in **Medo Photo Supply Corp. v. National Labor Relations Board,** 321 U.S. 678. The Respondent to the contrary asserts that the rationale of Medo has no relationship whatsoever to the instant case. In Medo the Board found as a fact 43 NLRB 989 at 994 that "if the proposed contract 'constituted a reasonable basis for negotiations' the respondent would consent to the Union's being certified after a check of its cards or an election and that the respondent would thus bargain with the Union."

In Medo also the Board, p. 998, found that the respondent **after having recognized** the Union then dealt directly with its employees. Such is not the instant situation.

It is the Respondent's feeling that the remedy here fails directly in line with the philosophy that Judge Medina expressed in **Schwarzenbach-Huber Co.,** supra, which case is the obvious culmination to the Second Circuit's disenchantment with the Board's bargaining order as expressed in the opinion below, which followed the same Court's reasoning in **NLRB v. Flomatic Corp.,** 347 F. 2d. 74, and **NLRB v. Better Val-U Stores of Mansfield, Inc.,** 401 F. 2d. 491, and which Judge Simpson

expressed in J. M. Machinery Corp., **National Labor Relations Board v. J. M. Machinery Corporation** (CA. 5) F. 2d. , Slip Opinion #23756, (App. p. 61a), namely that for the Board to turn these employees over to the Union and to name the Union as the bargaining agent would be a very definite violation of Section 7 of the Act. (29 USC 157).

As the Fifth Circuit said in **J. M. Machinery,** p. 11, Slip Opinion (App. p. 71a), "We must carefully examine the effect of signing within the context of solicitation in order to determine if the employees understood what they were signing."

Judge Medina in **Schwarzenbach-Huber Co.** said p. 1369 (App. p. 44a) Slip Opinion, "This 'representation' card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be by-passed and the Union ushered in without giving the employes individually or collectively any voice in the matter . . . ."

"The invention and implementation of a scheme by which employees can be befuddled into thinking they are asking for a free election at which each can cast a secret ballot either for or against the Union, whereas they are in fact held to be signing away this very right without knowing they are doing so, seem to us to be a clear violation of Section 7. By the same token the bargaining order in this case nullifies the beneficent purposes of the Act and in no possible way can be said to effectuate the purposes of the Act. The forgotten man seems to have been the employee who was one of those who comprised the unit of production and maintenance workers in the Company's Juniata Plant."

In the instant case the employees involved, as explicit from their testimony set forth in the Appendix, did not sign

these cards in any respect with the understanding that the Union would thereupon willy nilly represent them. Consequently the adoption of the remedy sought by the Board would completely frustrate the purposes of Section 7 of the Act.

Insofar as this remedy is concerned, it is further the Respondent's opinion that the petition for certiorari should not depend on the Court's action in Sinclair and Gissel but that the petition should be denied based upon the arguments above adduced.

CONCLUSION

Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

May 12, 1969.

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Attorney for Respondent

APPENDIX

TRANSCRIPT OF TESTIMONY

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* * *

WILLIAM F. CARLSON

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

* * *

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Q Was there a discussion about the strike at that time among you?

A The discussion was that we decided among ourselves that we go back to work, to go back to talk to Pembek.

Q And did you do that?

A Yes sir, we did.

Q When?

A Approximately 8:30 we went to Pembek.

* * *

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THE WITNESS: Yes, they did. When they came to us, Jack informed us that he had just heard from his lawyer, Mr. Larkin, that we were members of the union because of the signatures on these cards which we did not know, and as of that time they could say nothing to us or negotiate anything whatsoever with us, and this is all they said.

Q (By Mr. Zankel) Did that end the conversation and the conference on September 15?

A That is all that Jack and Fred said, yes, and they turned around and walked out again.

Q What did you employees do?

A We were very upset to think that we were in the union because of the signatures of these cards. None of us understood that when we signed them although we did read

them, most of them read them.

MR. ZANKEL: I move to strike the answer as unresponsive.

TRIAL EXAMINER: Obviously the witness cannot tell what someone else knew. He can only talk about what he himself knew. You tell us what you yourself knew when you signed the card.

MR. ZANKEL: I would object to the Trial Examiner's request, sir.

TRIAL EXAMINER: Tell me what you yourself thought. You can't tell me what anyone else thought.

THE WITNESS: About this card?

TRIAL EXAMINER: What you thought you meant by signing the card.

MR. ZANKEL: May I be heard on the objection on the record?

TRIAL EXAMINER: Yes.

MR. ZANKEL: I think that the Examiner at this point goes directly to the subjective intent of the card signing. Now, while I don't say that this intent is entirely irrelevant because there are certain circumstances where it might be relevant, however, in this particular instance you have before you in evidence a clear and unambiguous legend on

this card. The witness has testified that he has read it, and I submit to you that the outstanding case authority would
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say under these circumstances it would be improper to inquire into the card signers subjective intent.

TRIAL EXAMINER: I think your point is well taken. I am reversing my ruling and sustain your objection. So don't tell what you or anybody else thought about the card.

MR. ZANKEL: I have no further questions.

TRIAL EXAMINER: Mr. Larkin?

CROSS EXAMINATION

Q (By Mr. Larkin) Mr. Carlson, what did you do after Jack Grant and Fred Knell came out and told you that they couldn't talk to you?

A I started to say the men were kind of upset to think that the men were in the union.

MR. ZANKEL: Objection. The questions calls for an activity and not a thought.

TRIAL EXAMINER: I will overrule your objection.

Q (By Mr. Larkin) Go ahead.

A Would you repeat the question.

TRIAL EXAMINER: Will you read the question.

(The question was read as follows: "Mr. Carlson, what did you do after Jack Grant and Fred Knell came out and told you that they could not talk to you?")

THE WITNESS: The men and I decided we would find out how true it was that we were, by the signing of these cards, members of the union. We did remember from the
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day before that a meeting was held at the Holiday Inn be-

tween the union, Pembek and the mediation board. I think this was the word, it was a mediation meeting. But any how, we tried to find out among ourselves. I think, I seem to remember, I think I remember that we asked Mr. Emery, Mr. James Emery if he recalled any of the names that were mentioned or that were there at this meeting at the Holiday Inn, and I think he said he didn't remember. So as I said, we wanted to find more information because Pembek couldn't talk to us. We had no one to talk to other than ourselves. So Jack Grant was out in the yard. He was loading an oil truck. One of the fellows went to him and asked if he could give us the name — I think he was a federal man or a state man — that was there so we could at least call him to talk to him. Well, I think I—

TRIAL EXAMINER: The person who had been present at the meeting the previous day?

THE WITNESS: Yes, sir. I think his name turned out to be Mr. Donnelly from the State Labor Board in Hartford. So we got on the phone and got information out of Hartford to find out where this labor board was. After a few calls we did contact Mr. Donnelly's office. We were informed then that he was not there, that he was home. They didn't mind giving us the telephone number, and I made the call, and I think it was North Haven, and I asked

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Mr. Donnelly if he could give me any information in respect to the way these cards were signed and how we were affected with the union. Well, Mr. Donnelly couldn't give us any information. So then we were at a standstill again.

So again we tried to think of someone we could call to get more information, and I asked Jack if he could give me the name of, I think he is a federal man out of Boston. Now, I don't recall whether his name was McGurty or McNerny,

something like that, but anyhow, and if we could also have the address or telephone number of this place in Boston. Mr. Grant gave me this, and I made a call to Boston, and I talked to this fellow up there, and he said that the cards, I'm pretty sure he said that the cards were valid and that they, somewhere along the line, your Honor, I don't recall this for sure. Someone said that these cards were valid or binding or binding up to six months. What this meant I don't know. So, anyhow, once we knew that we were automatically members of the Teamsters Union, we decided to call Mr. James Galullo in Waterbury to find out a little more information.

James Emery called Mr. Galullo. I called Mr. Galullo's office in Waterbury and James talked to him.

TRIAL EXAMINER: What day was this?

THE WITNESS: This was the 15th.

TRIAL EXAMINER: You made the call but Emery 230 talked?

THE WITNESS: I dialed.

TRIAL EXAMINER: You dailed and you gave the phone to Emery?

THE WITNESS: Right.

MR. ZANKEL: 15th day of what?

THE WITNESS: September.

TRIAL EXAMINER: Go ahead.

THE WITNESS: What the conversation was about, your Honor, I can't honestly tell you other than the fact that Galullo said that we were in the union.

TRIAL EXAMINER: He told this to Emery?

THE WITNESS: I think so, I'm not sure.

TRIAL EXAMINER: Did Emery tell this to you?

THE WITNESS: Yes, he did, sir, but it was so much confusion that day in all our minds, I can't honestly say what he said.

So that's where it stood, and this is where it has stood.

Q (By Mr. Larkin) Thereafter did you decide to do anything further?

A Yes, sir.

Q What did you do?

A Well, if I may go back just a little bit, the day before—that would have been Wednesday—

TRIAL EXAMINER: The day before you called Mr. Galullo?

THE WITNESS: This was Wednesday, the day of the strike, the day we were out. After this meeting at the Holiday Inn, James Galullo, Carl Collins and James Emery

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came back from this meeting and Carl Collins asked Jimmy Galullo, "Listen, if these guys want to go back to work, if you want to give me another job, I will take it. These guys can go back to work."

TRIAL EXAMINER: I can't quite follow.

THE WITNESS: Mr. Collins said to Jimmy Galullo—

TRIAL EXAMINER: Collins said to Galullo?

THE WITNES: Right.

TRIAL EXAMINER: That is Carl Collins?

THE WITNESS: Yes, sir, Carl Collins, yes. Collins said to Galullo, he asked Mr. Galullo if these fellows, namely, ourselves, wanted to go back to work, what would happen. Galullo stated right there and then he would have nothing to do with us whatsoever.

MR. ZANKEL: Mr. Examiner, I move to strike the witness' reply up to this point as being completely unresponsive and irrelevant. The question was what did he do. He was not asked to describe a prior conversation.

TRIAL EXAMINER: This is true. The witness' answer which the witness just gave is not responsive. On that ground, I will strike the answer.

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MR. LARKIN: I will withdraw the question.

Q (By Mr. Larkin) Mr. Carlson, on the previous day, the day of the strike you testified there was a meeting at the Holiday Inn?

A Yes, sir.

Q Attended by company and union representatives and some mediators?

A Yes, sir.

MR. ZANKEL: Objection.

TRIAL EXAMINER: On what ground?

MR. ZANKEL: I don't believe Mr. Carlson so testified.

TRIAL EXAMINER: Overruled.

MR. ZANKEL: I will agree Mr. Galullo—

TRIAL EXAMINER: Your objection is overruled.

Q (By Mr. Larkin) After the meeting was over, did Messrs. Galullo, Collins and Emery come back to the picket lines?

A Yes, sir.

Q Where was— was there a conversation at that point?

A Yes, sir.

Q Did Mr. Collins say anything about the men going back to work?

A I am almost positive that he asked Mr. Galullo, he said to Mr. Galullo, "Listen, if these guys want to go back to work, I will take your job." In other words, the job that was offered to him the night of the meeting over at Waterbury. Mr. Galullo said, "If these guys go back to work or go back down to the yard, I am through with them."

Q. Did he say, "If you don't stand behind Carl Collins, 233
I am not going to have anything to do with you"?

A Yes, sir, he made that statement.

Q Well, on the 15th you finished talking or Jim Emery had finished talking with Mr. Galullo, after that date did you do anything about your card?

A Did I do anything about the card?

Q Yes.

A Yes, I tried to find out myself, including all the rest of the men, how valid this thing really was.

Q What did you do?

A We decided among ourselves that we would seek legal counsel.

Q And who was your legal counsel?

A Well, at the time of the discussion, we had a choice of two attorneys. John Kraemer was the one that we selected.

Q And you want to see Mr. Kraemer?

A Yes, sir.

Q And as a result of your visit, showing you Respondent's 7(c), is that your signature?

A Yes, sir.

MR. ZANKEL: I thought those were— all right, I'm sorry.

Q (By Mr. Larkin) Was that paper drawn up by Mr. Kraemer at your direction?

Yes, it was.

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Q And you signed it?

A I was in the yard at Pembek.

Q Do you recall when this was?

A I would guess a good week and a half after Carl came to work.

Q Is it before you signed them?

A Oh, yes, because I hadn't got the card then.

Q Would you relate that conversation?

A Will I what?

Q Tell us who said what, what you said and what Collins said at that time.

A Carl asked me if I thought there were enough men interested in talking to a union man about forming a union, and I said to him I thought that there were, and he said to me that if there were enough men interested, he would contact a union man, and I don't know whether he said 677 or what the number was, but he said that he would see to it that some information was sent to us, and these cards, and that is when we got these. All we had to do was sign the cards and send them back in, and this is what we did. This is what I did.

Q Did you ever ask Carl Collins if you signed the card what that would mean?

A It seems that I remember that we asked, I asked whether or not this was going to be—No, sir, I don't remember.

Q Do you recall whether or not you asked him if you

signed the card that it would mean you would be a member
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of the union?

A Yes, sir, I think I do believe I did ask him that.

Q What was his reply?

A No—

MR. ZANKEL: Mr. Examiner, may I inquire when this conversation occurred?

TRIAL EXAMINER: He said sometime shortly after Collins came to work for the company. He was unable to fix the date with certainty but before the cards certainly.

MR. ZANKEL: If the witness understands that is the period.

TRIAL EXAMINER: We are talking about the same period aren't we?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Before the card was sent to you in the main?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Is that satisfactory, Mr. Zankel?

MR. ZANKEL: Yes, sir. Thank you.

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Q (By Mr. Larkin) Did you or Collins say anything more about the cards as to what they were for in that conversation?

A I understood it to be the signature on this card was only to show Mr. Galullo or the union that there were enough men interested in maybe forming a union.

TRIAL EXAMINER: Is that what you understood?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Did you tell this to anybody or anybody else tell you this?

THE WITNESS: All the men were in agreement.

TRIAL EXAMINER: Did somebody tell you that this was the purpose of the card or is this something you yourself arrived at?

THE WITNESS: Carl Collins stated by the signature of the card it didn't mean we were members of the union.

TRIAL EXAMINER: That he said to you, but did he say anything else?

THE WITNESS: I don't really remember, your Honor.

Q (By Mr. Larkin) Did you have any talk with Collins and say to him that you wanted the Pembek employees to have the first say?

A Yes, sir, I did.

Q What did you mean by that?

MR. ZANKEL: Objection.

TRIAL EXAMINER: On what ground?

MR. ZANKEL: I think we are going far afield, Mr. Examiner, when we inquire as to the subjective intent again of a remark that seems to be clear.

TRIAL EXAMINER: Well, I am certain it is not clear to me. Now, what was the question?

(The pending question was read by the reporter.)

THE WITNESS: Meaning that once we were told or 240 once we were asked to sign these cards, we thought that it was only a show of strength, as I said before, that enough men were interested in the union. We were, I was led to believe that that signature on this card only meant that Jimmy, as Carl related or told us, Mr. Galullo would come

to Pembek and tell Pembek that enough men were interested in probably forming a union, and that after this talk took place, then it would be up to us to decide whether or not we wanted to vote the union in or listen to what Pembek had to say, but Pembek never had a chance to say anything.

TRIAL EXAMINER: I am confused. Are you telling me that this is what Mr. Collins told you, or is this something you, a conclusion you arrived at from something else which Mr. Collins told you?

THE WITNESS: I think it is my own conclusion.

TRIAL EXAMINER: That is what I wanted to know.

* * *

All right.

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* * *

THE WITNESS: I don't recall anything specific that they said, your Honor, except everyone looked disgusted, nothing had been settled. We thought certainly something would happen, and as it turned out, nothing happened. I sensed, we all sensed Carl felt sorry for us in some little way.

TRIAL EXAMINER: Don't tell us what you felt or what anyone else felt. Tell us what was done, what was done with respect to this phrase "I will take this job that you offered me last night."

THE WITNESS: Carl asked Jimmy or he said to Jimmy "If these fellows want to go back to work, they can, and I will take that job that you mentioned the other day," and Mr. Galullo said if we want back to work or went down that driveway, he would have nothing to do with us.

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JAMES H. EMERY

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

* * *

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Q Now, at that meeting in Waterbury, did Mr. Galullo ask the men if they were going to back Collins?

A Yes, sir.

Q And what else did he say?

A About backing Collins?

Q Yes.

A That if we didn't back him, then he didn't want any more to do with us, that he would put Collins to work and the rest of it he would read about.

* * *

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A He informed me that several of the men were going back to work, and he also read a newspaper clipping that came out that morning, and he was quite upset about it at the time, and after he read it to me, I was too.

Q Showing you what has been marked as Respondent's Exhibit No. 8 for identification, is that the newspaper article that he read to you?

TRIAL EXAMINER: You mean this is 9?

THE WITNESS: I believe that was it.

MR. LARKIN: Question withdrawn.

Q (By Mr. Larkin) After Mr. Carlson read this article to you, what did you then do?

A I told him I would be right there.

Q And what occurred at the meeting at Flynn's restaurant?

A Trying to decide how many of us was going back to work, and finally decided that everybody was and we left.

Q Did you leave there and go to work unannounced or how did it come about?

A Bill Carlson called Mr. Grant and asked if it would be all right.

Q All right?

A To come back down to the shop.

Q And you all went down?

A Right.

Q After you got down there, Mr. Carlson related that you had a conversation in the office, all the men together, with

Messrs. Grant, Knell and Thuotte, and then you went to the back and were told by Jack Grant that he couldn't talk to you, is that right?

A That is correct.

Q Thereafter there was testimony that you called or talked to Jim Galullo on the telephone?

A That is correct.

Q Now, will you relate that conversation?

A I called him and told him that we didn't want anything to do with the Teamsters Union. I also asked him about these cards, how long we were bound to them, and he said we weren't bound to the cards. We didn't pay any dues or have any union benefits, that this meant that they would represent us, and asked him how long they were binding and told him that we didn't want him to represent us, and he said he wouldn't give me any direct answer as to how long they wese binding except to say that as soon as the charges were settled. I believe that is the way he put it.

Q And as you recall, that was the extent of that conversation?

A Approximately. I told him that we wanted out because we believed we were misled into it, and the rest of it, I think, we had quite a long conversation, but it was mostly around this same thing, about this same thing.

Q About the cards and—

* * *

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DONALD MACLELLAN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

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THE WITNESS: I was asked if I would sign.

Q (By Mr. Larkin) At that point?

A Yes. I was given a card.

Q Did you read it?

A No, I didn't.

Q Just signed it?

A I signed it.

Q Did you know what you were signing?

MR. ZANKEL: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Larkin) Did anybody tell you what you were signing?

MR. ZANKEL: Objection, asked and answered.

TRIAL EXAMINER: Overruled.

THE WITNESS: I was just told about what seemed

to be assumed among the employees that these cards authorized us more or less to talk to the union to see what they had to offer.

Q And after that you signed them?

A —

Q You have to say yes or no?

A Yes.

* * *

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A Well, he was down there, yes.

Q Do you recall?

A I recall he had a different statement to make, yes.

Q What was the statement he made at that time about the picket line?

A Well, one was if we broke the picket line and went back to work, he would be through with us, and not to even bother phoning him, that he would pick up his signs and he would be through with us.

* * *

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TRIAL EXAMINER: Now, you testified that somebody told you that the cards, that you had to sign a card or the employees had to sign cards before the employees could talk to the union. Do you remember testifying to that effect?

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THE WITNESS: No. I said I talked or talk was among the employees that we wanted to talk to the union, see what they had to offer and cards were more or less permission to talk to the union.

TRIAL EXAMINER: Who said that to you or who told you that?

THE WITNESS: It was the general conversation between a number of the employees.

TRIAL EXAMINER: There was no representative of the union at that time, was there?

THE WITNESS: No.

TRIAL EXAMINER: Do you want to inquire along these lines, the line I opened up?

MR. LARKIN: Was Collins there?

TRIAL EXAMINER: Well, just a moment. Let Mr. Zankel go first.

MR. ZANKEL: I have no questions along that line.

RECROSS EXAMINATION

Q (By Mr. Larkin) Was Collins there?

A Yes.

MR. LARKIN: As far as I am concerned, he is a representative of the union, Mr. Trial Examiner.

MR. ZANKEL: Is that a question?

MR. LARKIN: This is my statement.

* * *

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FELIX GEORGE ROULEAU

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

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Q Prior to signing this card, General Counsel's Exhibit 17, had you had any conversation with Carl Collins about the card?

A. Yes.

Q And where did you have these conversations and when?

A It was back in Pembek's yard. Now, the date I can't give you, but it was prior to sending this card in.

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Q And what was the conversation you had with him?

A I asked Collins if this card we would be sending in would be binding us to the union in any way, and he informed me that it wouldn't.

Q Was that the whole conversation?

A That was just about it.

Q Did he say anything about what the card was for?

* * *

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THE WITNESS: Yes, I can't give you an exact quote

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because this is too long ago, but I do know that he told me that this was just an introductory card, that I was to attend a meeting to see what the union had to offer and so forth.

Q (By Mr. Larkin) Did you ask him whether or not the card meant you were in the union if you signed it?

A Oh, yes. I answered that that was the point I wanted to make first. This card was not to be binding to me in any way, binding me to the union in any way.

Q And after that conversation, you signed it?

A After that conversation, I signed it, yes.

* * *

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THE WITNESS: We have to go back now to the night before. After we came home from the walkout, I called Mr. Niland. He is a member worker of Pembek.

TRIAL EXAMINER: After you came home after picketing all day?

THE WITNESS: After picketing all day. I called Mr. Niland and asked him if he worked that day, and he said

yes, he worked because he didn't honor this walkout because it was an unauthorized walkout, and he was going to work along as usual. Bob Schellinger, I guess, is also a member of the same union. So then I figured if they aren't honoring this walkout, there must be something wrong here some place. So then I began calling each one of the fellows who walked out, and I told them I don't care what they are going to do, but the way things are, I am going back in in the morning. I told them they could do what they wanted, but I was going back, and I called each one of them and told them the same thing, and they in turn informed me that they were going to come in because I informed them of the telephone call I made to Jimmy.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—September Term, 1968.

(Argued November 8, 1968 • Decided March 5, 1969.)

Docket No. 32286

THE SCHWARZENBACH-HUBER COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Intervenor.

Before:

MEDINA and WATERMAN, *Circuit Judges,*
and LEVET, *District Judge.**

Petition for review and cross-petition for enforcement of an order of the National Labor Relations Board.

Schwarzenbach-Huber Company petitions to review and set aside an order of the National Labor Relations Board finding the Company in violation of Sections 8(a)(1)(2) and (5) of the National Labor Relations Act, as amended,

* Of the Southern District of New York, sitting by designation.

29 U. S. C., Sections 158(a)(1)(2) and (5), setting aside a representation election, and directing the Company to bargain with the Union. The Board cross-petitions for enforcement. The decision and order of the Board are reported at 170 N. L. R. B. No. 176 (April 17, 1968).

Petition to review granted; cross-petition for enforcement granted in part and denied in part.

MARSHALL C. BERGER, New York, N. Y. (Robert Abelow and Weil, Gotshal & Manges, New York, N. Y., on the brief), *for petitioner.*

RICHARD N. CHAPMAN, Attorney, National Labor Relations Board, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Lawrence M. Joseph, Attorney, National Labor Relations Board, Washington, D. C., on the brief), *for respondent.*

DANIEL B. JORDAN, New York, N. Y. (Cornelius J. Collins, Jr., New York, N. Y., on the brief), *for intervenor.*

MEDINA, *Circuit Judge*:

Schwarzenbach-Huber Company, a textile manufacturing concern with its principal place of business in New York City, petitions this Court to review and set aside an order of the National Labor Relations Board and the Board cross-petitions for enforcement.

This case presents a sequence of events in a familiar pattern. The Textile Workers Union of America AFL-CIO

used what is now commonly called the "representation" card method of obtaining the support of a majority of the production and maintenance workers in the Company's Juniata plant in Altoona, Pennsylvania. Claiming to have cards signed by a majority of the workers in the unit, the Union by letter of February 9, 1967 demanded a recognition of the Union and immediate collective bargaining. On February 13, 1967 the Union filed a petition for an election. On February 14, 1967 the Company by letter expressed its doubt that the Union represented "most or many" of its employees in the unit. The letter also joined in the Union's request for an election. On March 16, 1967 the election was held and the Union lost by a substantial margin. Thereafter proceedings were instituted by the Union to set the election aside, to establish various alleged unfair labor practices by the Company and to order the Company, without any new election, to bargain with the Union. These proceedings were consolidated; and, after a hearing and findings by the Trial Examiner, the Board set the election aside, held the Company's doubt that the Union had a majority was not a good faith doubt, sustained *in toto* all the claims of unfair labor practices; and, finally, on the ground that the unfair labor practices were so outrageous and pervasive as to dissipate the Union's majority prior to the election and that they made any new election in the foreseeable future impracticable, the Board ordered the Company to bargain with the Union.

We hold that neither on February 9th nor at any time prior to February 14th did the Union have in its possession valid cards signed by a majority of its production and maintenance employees. We set aside as not supported by substantial evidence on the record as a whole the finding that the Company's doubt that the Union had in its possession cards signed by a majority of its production and

maintenance employees was not a claim made in good faith. We sustain the Board's finding of two of the alleged unfair labor practices. As to the other findings of alleged unfair labor practices, we set them aside and refuse enforcement on the ground that such findings of unfair labor practices are not supported by substantial evidence on the record as a whole. We set aside and refuse to enforce the bargaining order as the Union did not have a majority, as the Company's doubt that the Union had a majority was made in good faith and as the making of a bargaining order under the circumstances of this case would clearly not effectuate the purposes of the Act.

Part I

The Bargaining Order.

The propriety of enforcing an order to bargain after a union has lost a representation election depends on the resolution of three questions: (1) whether the Union in fact had a majority; (2) whether the employer refused to bargain because of a good faith doubt of such majority, if the Union had a majority; (3) whether on all the facts of the election situation a bargaining order is an appropriate remedy for enforcing the policy of the National Labor Relations Act.

A

Did the Union Have a Majority?

The initial inquiry must, of course, relate to the number of employees in the unit. The Trial Examiner, all of whose findings were adopted by the Board, finds the unit was composed of 197 employees. This included Joan Iaia and

Ruby Evans, to the inclusion of whom, says the Trial Examiner, the General Counsel "takes no serious exceptions." Indeed, there was no basis for any objection whatever, as these two women were classified as weavers, they spent most of their time on the floor operating the looms and only a part of their time teaching the others how to operate the looms. The name of Marjorie Krise is apparently omitted, as her name "does not appear on the eligibility list as prepared by the Company for the March 16 election." Mrs. Krise should have been included in the unit. The uncontradicted evidence is that she and her husband had worked in the plant for a long time. In November, 1966 she told the Company "I'd like a layoff for medical and personal reasons." While she considered her personal health a private matter, there is other evidence in the record to indicate that the layoff was due to an allergy she had for silk and silk was then being worked in the plant. In February of 1967 her husband noticed that certain jobs were indicated on the Bulletin Board and she told him that she was interested in going back to work and would he see Mr. Kozak, the Personnel Manager. He saw Mr. Kozak who said he would be glad to see her. This was reported to Mrs. Krise. She saw Mr. Kozak and went back to the plant on February 20th. She had previously worked as a creeler but came back in a different department as an examiner, clearly within the category of a production or maintenance worker. If the fact that her name was not on the eligibility list has any significance, it is sufficient to say that the eligibility list was prepared as of the period "ending February 11, 1967," prior to the time when Mrs. Krise came back to work. As the name of Joyce Jewell, who quit work after the preparation of the eligibility list, was eliminated, it is clear that the name of Marjorie Krise should have been included.

Thus the unit becomes 198. The name of Vivian Becker, who was a regular worker but who was laid off temporarily in the early part of February because she had to find a new babysitter to take care of her children while she worked, should also have been included. This brings the total in the unit to 199.

The next consideration is the cut-off date. The Board concedes in footnote 20 on page 23 of its brief that "it does not rely on cards signed after February 14."[1] The Trial Examiner does not clearly state the fact that on February 9th, when the initial demand for recognition was made, the Union did not have a majority. But he finds that between February 9th and February 14th "4 additional employees signed representation cards," and he says the Union thus "obtained a majority of 103 cards out of a total of 199 unit employees, even assuming that Becker and Krise are to be included in the unit." This is on the theory that the Union's demand was of a continuing nature.

We hold that under the circumstances of this particular case the cut-off date is February 9, 1967, when the letter claiming a majority was sent by the Union. Since we find, as is disclosed in the ensuing discussion, that the Union had no majority on February 9, 1967, a compelling reason for

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1 This "concession" seems to imply that cards "signed" on or before February 14 should be counted. Of course, the date of the signing of the cards has no significance. Many of the employees signed cards and retained them at home or in their pockets or elsewhere for periods of several days, as appears in the Appendix to this opinion. They did this, we have no doubt, because they had not yet made up their minds to make the cards effective by delivering them to the Union. The significant date is the date on which the signed card is delivered to the Union.

Moreover, in no event could cards delivered to the Union on February 14 be counted, as the Board itself has ruled that the cut-off date cannot be later than the day before the date of the refusal to bargain. *Gotham Shoe Manufacturing Co.*, 149 N. L. R. B. No. 80, *enforced*, 359 F. 2d 684 (2d Cir. 1966).

this ruling is afforded by the fact that Frazier directed a wholesale distribution of copies of this letter at the plant gates on February 10. The intended effect of this widespread diffusion of the Union's false claim that it had a majority was undoubtedly to bring the reluctant sheep into the fold by telling them the fight was over, the Union had won and they might as well get on the bandwagon. No cards handed to the Union after the making of such a misrepresentation could possibly be deemed valid.[2]

We turn to the cards. During the oral argument of this case we made a request that the cards be sent to us. When they arrived they had been thoroughly shuffled and scrambled. It did not seem possible to arrange them in a meaningful way. But continued study of what appeared on the face, and what appeared also on the reverse side of each card, finally led to a solution which perhaps we should have noted in the beginning. The key to the cards is to be found in the symbol appearing on the reverse side of each card on the right near the top. When these cards are arranged in sequence from 1 to 122, in accordance with the symbols appearing on the reverse side of the cards, we can get a completely dependable factual pattern of the order in which the cards were counted. So that this may be checked by any interested person, we have added as an Appendix to this opinion a complete list of the 122 cards, arranged in the order just above described, together with the data appearing both on the face and on the reverse side of each card, including the date and time of filing with the Board.

The Examiner finds that the 4 additional employees above referred to are represented by cards numbered 101,

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2 See *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179-180 (2d Cir. 1962); *N. L. R. B.* v. *H. Rohtstein & Co.*, 266 F. 2d 407 (1st Cir. 1959).

96, 100 and 102 and he thus reaches the erroneous conclusion that the Union had 103 cards on February 14, 1967. Card No. 96 is particularly interesting. It is the card of Helen McKendree. The date is "2 1967." It was received at the plant gate on February 10, 1967 at the very time that copies of the Union's letter claiming a majority were being distributed. But it is erroneously given the number 96. It could not properly be counted as constituting one of the majority referred to in the letter of February 9th as the card was not received by the Union until February 10th. By some strange method of computation the Hearing Examiner counted this card as one of the "99 cards" he says were held by the Union at the time of the demand. And he counted this card again as one of the "4 additional employees." The correct number of cards in the possession of the Union on February 9, 1967 was 98.

The other 3 supposedly "additional" cards are also interesting. Card No. 100 was signed by Maury L. Delozier on February 13 but it was not delivered to the Union until February 21. This is after the cut-off date, so we still have only 98. Card No. 101 was signed by John Biancone on February 14 and delivered to the Union on the same day. This was too late; we still have 98. Card No. 102 was signed by Calsie D. Gearhart on February 11 but was not received by the Union until February 13, after the cut-off date of February 9, 1967.

Accordingly, we are compelled to conclude that on the cut-off date of February 9th the Union did not have a majority. And this remains true even if Krise and Becker are not included in the unit.

B

Are Many of the Cards Vitiated by Deceitful and Fraudulent Misrepresentations by the Union?

The chief professional union organizer was Carl Frazier an International Representative of the Textile Worker Union. Working as his lieutenant and next in comman was James Meyers. 35 cards were signed at the meeting o January 29, 1967. A few were signed at later meeting sponsored by the Union. Most of the cards were obtained by personal solicitation, which varied from visits to the homes of the workers to the passing out of the cards with or without an explanation of their purpose.

A very considerable number of those who signed the cards testified at the hearing. The result, however, was that the Trial Examiner counted all 122 cards which he characterized as "an overwhelming majority." The way this was done can be described as nothing short of extraordinary. Relying on *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268 (1963), *enforced*, 351 F. 2d 917 (6th Cir. 1965) and *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), the Trial Examiner held that unless a card signer had been told that the "sole" or "only" purpose of the card was to obtain an election, the signing of the card was a sufficient demonstration of an intention to appoint the Union as bargaining agent and that there was thus established an irrebuttable presumption which could not be neutralized by any testimony by the employee as to what he or she understood by the various representations made by Frazier or the other Union solicitors. In one or two instances where the testimony indicated that the representation was that the "sole" or "only" purpose of the cards

was to get an election, the Trial Examiner accepted these cards also, as he found the testimony not credible.

We turn first to the 35 cards signed at the meeting of January 29th. Frazier himself testified that he read the entire printed matter on the card, word for word, and that he made the following representations at the meeting of January 29, 1967: (1) if the Union lost the election the cards would be returned; (2) that the Union must have 30 per cent "of the people" before the Union can petition for an election; (3) "there has to be 51 per cent of the people vote for a Union." There was considerable testimony by employees to the effect that they were told that by signing the cards they would save $5. This seems to have been on the theory that, as no payment whatever was necessary to validate the card, they would save the payment of the initiation fee or dues generally required. What Frazier omitted to tell those present at the meeting is similarly established by Frazier's testimony that he did not tell those present that, even if the Union lost the election, it could still demand recognition and the right to bargain upon the basis of the cards. That he knew this to be so is clear from his testimony that, while he made no such statement at this particular meeting, he did make such a statement at other meetings. We think these flagrant misrepresentations and this wilful omission were deceitful and that the effect of making them was to perpetrate a fraud on those present at the meeting who signed the cards.

While none of the employees was permitted to testify to what these misrepresentations meant to him, we think the inference is perfectly plain. Each man present at the meeting must have concluded: "we employees are not accepting Union membership unconditionally. If there are enough cards to get an election, and an election takes place, I can

vote for the Union or against the Union as I choose. And, if the Union wins, I save $5. If the Union loses, that is the end."

Frazier was especially emphatic in insisting that he had never said to anyone, at the meeting or anywhere else, that the "sole" or "only" purpose of the cards was to obtain an election.

Thus because of these flagrant misrepresentations and this wilful concealment, we have no alternative other than to invalidate the entire 35 cards signed at the meeting of January 29th.

Against this background it is, we think, of no significance that none of the signers of any of the cards demanded the return of his card by the Union. The *ex parte* action of the Union in sending union membership cards and union literature to each person who signed a card is likewise of no significance in the light of the representations made by Frazier.

To cover the matter of the cards more thoroughly we specifically invalidate the cards of six employees. Three of these, Jonas Corbin, Jr., William Slone (whose card was erroneously recorded by Frazier as Stone) and Walter Delozier, attended the meeting on January 29, 1967. The other three, William Nolan, Ronald Taddy and Patrick O'Hara, so far as appears, did not attend the meeting of January 29, 1967.

Jonas Corbin, Jr. was an active supporter of the Union who, after signing his card at the meeting, distributed cards to other employees and urged them to sign for the Union. He was asked what Mr. Frazier said at the meeting:

> A. Mr. Frazier said that the cards were—that we were signing the cards so that we could get an election down at the plant.

Q. Did you ask any questions? A. Yes, sir.

Q. What was the question you asked? A. I asked why, I asked why it said on the card that we were signing to become a member of the Union; I asked whether we were actually a member of the Union, were they going to collect dues from us if the Union wasn't voted in and Mr. Frazier then told me, he said, "No, you will get your card back if the Union isn't voted in."

Q. Did he answer your question in any other way? A. To the best of my recollection, all he wanted was to get 30 per cent of the cards signed, 30 per cent of the people to sign blue cards so we could get an election.

He also testified that after the meeting as people were picking up and signing the blue cards, "the word came to me" that the people signing before the election "would save five bucks."

His understanding of what the cards meant is demonstrated by his statement, in turn, to those ten people to whom he distributed cards:

Q. Did you tell them anything about the purpose of the cards or what they meant? A. I told them that we had to sign 30 per cent of the people in the plant before we could even get an election and get the thing over with one way or another.

Clearly, the expectation that Corbin generated and that Frazier had generated in Corbin was that there would be an election to "get the thing over with one way or another." If the Union lost, the cards would be returned and no dues would be owed; if it won, an early signing would have saved five dollars. Signing the cards was meant to bring an election. To gain signatures by telling the employees

that there would be an election, without also telling them that the cards alone might be used to gain representative status, is a sufficient misrepresentation to invalidate the cards. When the employees were told, in effect, that they had nothing to lose by signing and could, by signing, save money and get an election to "get the thing over," this indicates that there was no intention to unconditionally authorize the union as the representative of the workers.

William Slone attended the meeting and signed his card there. He testified that at the meeting "they said they needed 30 per cent of the cards to have an election," also that by signing the card the initiation fee would be saved. He specifically remembered Frazier stating: "if the Union was not voted in, that these cards would be returned to you in the mail." In obvious reference to the election, he recalled that Frazier had said: "We need cards to get the ball rolling."

Walter Delozier recalled that when Frazier was asked at the meeting about the language on the cards that says "you belong to the Union when you sign it," he replied: "This is just to get the show on the road, so we can get a vote in your plant." When pressed on cross-examination he recalled an even stronger statement:

> Q. What did Joness (sic) Corbin say at the meeting that you attended? What questions did he ask Frazier? A. He stood up and said, "I have a question" and he said, "O.K.," and he said, "Is this card just to get a vote in the plant or company?" He said either one, I don't know which.
>
> Mr. Frazier said, "Yes, it is." But it doesn't say that on the card. Then he explained that it only takes 33 per cent of these cards to get a vote and the question was dropped right there.

As Delozier testified succinctly: "I read the card but I took Frazier's word."

When we turn to the testimony of employees who did not sign at the meeting of January 29, 1967, we find the same pattern of misrepresentation, half-truth and evasiveness by the Union organizers.

William Nolan had signed a card at his home. When asked what Harry McGraw, who had given it to him, said, he replied:

> A. He said they had to have a certain percentage to join the Union, to get a Union started.
>
> Q. Did he say anything about an election? A. Yes, he said there would be an election.

He also recalled that he had been told that the Union needed 30 per cent of the cards to get the Union started and bring about an election. The single, positive representation that there would be an election, without any indication that cards alone could bring in the Union without or despite an election, is sufficient to invalidate this card.[3]

Ronald Taddy was given a card by James Meyers, Frazier's assistant. When he asked Meyers about the card, Meyers replied that they had to have 30 per cent to have an election. When pressed on cross-examination, as to whether he had been told that signing the card "would help you get the Union," he replied instead that "It would help us get an election." He testified that Meyers had said nothing to him about dues but that "it was rumored around the mill—" and then he was cut off.

Patrick O'Hara was told:

> A. Well, it would save you the first year's fee and that they would use the card to get the majority of the

3 *N. L. R. B.* v. *S. E. Nichols Co.*, 380 F. 2d 438 (2d Cir. 1967).

> cards signed, you know, but it was to get a vote going in an election.

Guella, also told him that the first year's fee was five dollars, and that "the purpose of the card was to have enough cards to get a vote." When he was asked if he had ever asked for his authorization card back, he responded:

> A. No, I didn't. May I ask one thing? I was under the understanding when I received—.

He was not permitted to testify to his understanding but from the testimony in the record, it is clear that he like the others thought that signing the card would bring an election and, if the Union succeeded in the election, would save dues for a year.

We specifically invalidate the cards of Jonas Corbin, Jr., William Slone, Walter Delozier, William Nolan, Ronald Taddy and Patrick O'Hara.

We do not find in the testimony of these witnesses the "conglomeration of self-contradictions and inconsistent statements" to which the Trial Examiner makes reference. On the contrary, the testimony of these witnesses is clear and entirely consistent with the testimony of Frazier as described in Part I B of this opinion.

C

The Aftermath and the Balance of the Cards.

As the Board in its brief, footnote 20 on page 23, states: "the Board does not rely on the cards signed after February 14," no explanation is required of the large number of cards that came into the possession of the Union thereafter. But the Hearing Examiner counted all 122 cards. So, for the sake of completeness, we shall go into the question of how the Union procured this large number of cards.

It will be recalled that, despite the demonstrable lack of a majority on February 9, the Union distributed at the plant on February 10 copies of the letter of February 9 asserting the Union's false claim that it possessed a card majority on February 9. The effect of this additional misrepresentation is shown in the Appendix. Indeed, this new maneuver worked so well that the Union on March 3, 1967 mailed the following letter (Respondent's Exhibit 22-a) to each employee who had not already signed a card:

TEXTILE WORKERS UNION OF AMERICA
Affiliate of the AFL-CIO and CLC
1060 Broad Street
Newark 2, N. J.

March 3, 1967

Dear Friend:

We have just received the complete list of Schwarzenbach-Huber employees from the Labor Board. According to our records, you have not signed a Textile Workers Union Membership Authorization Card.

We regret that we could not write to you sooner because our mailing list was not complete.

With the Secret Ballot Election just a few days away, we want to take this opportunity to invite you to join with the *MAJORITY* of your co-workers who have already signed Union cards.

The Textile Workers Union and your TWUA Local UNION is open to all Schwarzenbach-Huber employees. The TWUA is here to help all Schwarzenbach-Huber workers—not just a select group.

Even though we are confident of victory, since a *MAJORITY* have pledged to support our Union—you

know as well as we know that a big Union vote will mean a strong local union at Schwarzenbach-Huber—which will result in *HIGHER WAGES, MORE BENEFITS* and *BETTER WORKING CONDITIONS* for *YOU, THE WORKERS!*

Be a chartered member before the election—please come to the planned rally that will be held before the election.

REMEMBER—"IN UNITY THERE IS STRENGTH"

Fraternally yours,

/s/ CARL E. FRAZIER
Carl E. Frazier, Int'l Representative

D

The Law.

It may be doubted that the courts deciding *Cumberland*[4] and *Joy Silk*[5] ever intended the rules enunciated in those cases to be applied "so woodenly" as the Board did in this case and others, to use the expression of Judge Wisdom in *N. L. R. B.* v. *Southland Paint Company*, 394 F. 2d 717, 725 (5th Cir. 1968). See the reinterpretation of *Cumberland* by the Sixth Circuit in *N. L. R. B.* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609 (6th Cir. 1967). In any event this *per se* approach has been very generally criticized[6]

4 *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268 (1963), *enforced*, 351 F. 2d 917 (6th Cir. 1965), *supra et passim.*

5 *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), *supra et passim.*

6 See Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851 (1967); Comment, *Refusal-To-Recognize Charges under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. Chi. L. Rev. 387 (1966); Note, *Union*

and the rulings of these two cases have suffered much erosion.[7] In this Circuit the *Cumberland* rule has been rejected. *Bryant Chucking Grinder Co.* v. *N. L. R. B.*, 389 F. 2d 565 (2d Cir. 1967) concurring opinion of Judge Friendly, at page 569, citing *N. L. R. B.* v. *S. E. Nichols Co.*, 380 F. 2d 438 (2d Cir. 1967).

The *Nichols* rule, at page 444, is succinct and comprehensive:

> The decisive question is whether the employees "meant to make the Union their representative" or instead "understood the cards not to be votes for the Union" but rather requests "that an election should be called at which they would vote for or against the Union as they then pleased."

And again, at page 445:

> Employees * * * who were willing to be represented by a union if the employer acquiesced on a showing of a majority might well not cavil over the union's being able to force recognition without an election if the

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Authorization Cards, 75 Yale L. J. 805 (1966). See also, R. Winter, *Judicial Review of Agency Decisions: the Labor Board and the Court*, in 1968 The Supreme Court Review 53 (P. Kurland ed. 1968).

7 See, e.g., *N. L. R. B.* v. *Texas Electric Cooperatives*, 398 F. 2d 722 (5th Cir. 1968); *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4th Cir. 1968); *N. L. R. B.* v. *Lenz Co.*, 396 F. 2d 905 (6th Cir. 1968); *N. L. R. B.* v. *Southland Paint Co.*, 394 F. 2d 717 (5th Cir. 1968); *N. L. R. B.* v. *Lake Butler Apparel Co.*, 392 F. 2d 76 (5th Cir. 1968); *N. L. R. B.* v. *Arkansas Grain Corp.*, 390 F. 2d 824 (8th Cir. 1968); *N. L. R. B.* v. *Dan Howard Mfg. Co.*, 390 F. 2d 304 (7th Cir. 1968); *Crawford Mfg. Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4th Cir. 1967), *cert. denied*, 390 U. S. 1028 (1968); *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967); *N. L. R. B.* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609 (6th Cir. 1967); *N. L. R. B.* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851 (1st Cir. 1967); *Engineers and Fabricators, Inc.* v. *N. L. R. B.*, 376 F. 2d 482 (5th Cir. 1967); *Bauer Welding and Metal Fabricators, Inc.* v. *N. L. R. B.*, 358 F. 2d 766 (8th Cir. 1966).

employer did not. It is quite a different matter to permit a union to attain recognition by authorization cards procured on the affirmative assurance that there would be an election without a further clear explanation that the cards can and may also be used to obtain recognition without any subsequent expression of preference by the employees; such a half-truth gives the employees the false impression that they will have an opportunity in all events to register their true preferences in the secrecy of the voting booth.

This would also seem to make it improper in cases to come before us in this Circuit to exclude evidence of understanding and intention as held in *Joy Silk*. Thus, whether an ambiguity appears on the face of the card, or as the result of a statement made by the union solicitor, and in all cases of misrepresentation and omission such as we have in this case, the burden rests on the General Counsel to establish by a preponderance of evidence that the signer of the card intended to do more than merely to indicate his desire that there be an election to decide whether or not the Union should be the bargaining representative of the employees in the unit. See *N. L. R. B.* v. *Peterson Brothers, Inc.*, 342 F. 2d 221, 224 (5th Cir. 1965). Without such proof the cards subject to such infirmities must be discarded as invalid.

The cases indicate that the cards used by the various unions are worded differently. Some of them, as mentioned by our Brother Friendly in a footnote to his opinion in *Nichols*, 380 F. 2d at page 442, contain in the printed matter a statement that the signer of the card accepts membership in the Union. Such a statement appears on the cards used by the Union in this case. In the context of the misrepresentations and omissions by the Union representatives and

solicitors in this case we think the precise wording of the printed matter on the cards cannot change the result in those instances where we have invalidated the cards.

E

Was the Company's Claim That the Union Lacked a Majority Made in Good Faith or in Bad Faith?

From the background we have already sketched it would seem that any doubt concerning the Union's majority would have been clearly justified as made in good faith. It was Brooks Taylor, the plant manager, who wrote the letter of February 14th, in which it was stated that the Company doubted the Union's majority status as asserted in its letter of February 9th. This letter was prepared after consultation with the Company's counsel in New York who either supplied the wording of the letter or the contents before it was written.

In the part of his decision stating his reasons for rejecting the Company's claim of a good faith doubt that the Union had in its possession cards signed by a majority of the employees and could prove it, the Trial Examiner quotes the following excerpt from Taylor's testimony:

> Q. Isn't it true that you received General Counsel's Exhibit No. 8 [the Union's demand letter] on February 10, Friday? A. I believe so, yes.
>
> Q. What was the first thing you did when you got that letter? Didn't you contact your attorney in New York? A. Probably, yes.
>
> Q. I show you General Counsel's Exhibit No. 9, which is a letter signed by you written to the Union dated February 14, 1967, and ask you that isn't it true that your attorneys either gave you the wording or the contents of that letter before you wrote it? A. Yes.

One would suppose that this indicated disapproval by the Trial Examiner of the seeking of legal advice by an employer. But the Board, in footnote 1 to its decision, says:

> Respondent asserts in its brief that the Trial Examiner relied on the fact that the Respondent consulted its attorney before replying to the Union's request for bargaining in finding that Respondent had no good-faith doubt of the Union's majority status. We do not believe that the Trial Examiner relied on the fact that Respondent consulted its attorney, nor do we.

This is not the first time this has happened. We wish to make it plain that employers as well as unions have a perfect right to consult their lawyers. That is what lawyers are for. If consultation with counsel indicates anything, it shows a desire to conform with legal requirements, to obey the law. It is quite reprehensible and wrong to insinuate, or to imply or to state that an adverse or damaging inference or deduction is to be made from the fact that an employer consults his lawyer in connection with any matter involving the relationship between an employer and his employees or a Union or in connection with any labor dispute or controversy.

To back up his contention that the Company's doubt of the Union's majority status was genuine Taylor testified to a number of significant circumstances that had come to his attention, some of which were hearsay. As he was testifying to his own state of mind, this hearsay was clearly admissible. Thus he said that he heard the Union started organizing not in late January, as asserted by the Union but in October or November, passing out a pamphlet which had a detachable card on the back that persons could cut out and return to the Union expressing their interest. He

also heard of meetings on Sunday afternoons in November and December but heard there never were more than 17 present and the earlier effort seemed to have died down. He heard about the meeting in late January and thought there were about 35 to 40 persons there, most of whom signed cards. As he calculated, adding this number to the 17 who had attended meetings in November or December, would bring it up to about 45. This was an inconsiderable number in view of the size of the unit. He also testified that the Company had many older employees who had been with the Company at the time this very Union had gone through prior elections, which the Union had always lost. He also testified that he heard that cards were being signed by employees just "to get people off their backs" and he did not feel that they were signing "without this pressure on them."

Taylor's doubt was not rejected because the Trial Examiner did not believe him. Indeed, his testimony was direct, responsive and frank, so far as we can tell from the record. The rejection by the Trial Examiner of the Company's alleged good faith doubt seems to be based on some theory of punishment for the alleged unfair labor practices which, even though most of them happened after the period February 9—February 14, are supposed to evidence a determination "to gain time in which to dissipate that majority." A finding based upon any such theory cannot stand. Moreover, the Trial Examiner erroneously placed the burden of proof to "demonstrate the good faith required to justify his failure to bargain" upon the Company.[8]

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8 *Lane Drug Co.* v. *N. L. R. B.*, 391 F. 2d 812 (6th Cir. 1968); *Textile Workers Union* v. *N. L. R. B.*, 386 F. 2d 790 (2d Cir. 1967); *N. L. R. B.* v. *River Togs, Inc.*, 382 F. 2d 198 (2d Cir. 1967); *N. L. R. B.* v. *Great Atlantic & Pacific Tea Co.*, 346 F. 2d 936 (5th Cir. 1965); *Hercules Packing Corp.*, 163 N. L. R. B. No. 35 (1967); *Aaron Bros.*, 158 N. L. R. B. 1077 (1966).

These alleged unfair labor practices will be discussed in detail later in this opinion. It will suffice to say now that we find most of them not supported by substantial evidence on the record as a whole. The two that we do sustain and will enforce relate to the Clyde Brown incident which happened on February 21st and the formation of the Committee in violation of Section 8(a)(2) which took place after the election.

That the Board's rejection of the Company's good faith doubt finds no substantial support in the record as a whole is further demonstrated by some of the reasons given by the Trial Examiner for rejecting it.

On February 2nd Walter Delozier, Rodger Trotter and Donald Craig came in and told Taylor that many employees were signing cards because they were tired of being pressured both at work and at home to sign the cards and because they were tired of listening to pro-Union and anti-Union discussions at every turn. On the advice of his counsel Taylor made a memorandum which is Respondent's Exhibit 5, signed by him and also signed by Delozier, Trotter and Craig. A somewhat similar memorandum is Respondent's Exhibit 6 dated February 7th. These memoranda are given no weight by the Trial Examiner because they are "largely self serving" and because they are not corroborated by the employees "who supposedly were so pressured." The fact that the memoranda, prepared on the advice of counsel to serve as corroboration and to refresh Taylor's recollection, are self serving is a strange sort of objection. Of course, they are self serving and their validity depends only upon Taylor's credibility, which is unquestioned on the point of good faith and which is corroborated by the signatures of Delozier, Trotter and Craig. At least as to the signature of Walter Delozier this can be compared

with the signature on his card. Moreover, there is ample testimony in the record that pressure was brought to bear on many of the employees.

The Hearing Examiner adds as a further reason tha the employee witnesses produced at the hearing had been first interviewed by counsel for the Company only a few days before the hearing. The Trial Examiner evidently thought that counsel should have interviewed the employees some time in February or March. Had he done so, it is easy to imagine that this would have been alleged as another unfair labor practice. This is just another instance of the "damned if you do, damned if you don't" approach by the Board that we criticized in *N. L. R. B.* v. *Dorn's Transportation Company, Inc.*, decided January 9, 1969, Slip Sheet p. 863 at p. 878. Moreover, when the interviewing was done, scrupulous care was taken to advise the persons interviewed that they were not required to answer the questions if they did not wish to and that whatever they said would have no effect whatever on their continued employment.

A further argument on the good faith issue is that the Union in its letter of February 9, 1967 offered to prove it had a majority and the Company did not accept this offer. A similar argument is found in Board rulings and court opinions in many cases of the same type as the one before us. We hope this opinion will help to expose the unreality and complete futility of such alleged offers to prove possession of a card majority. Of course the Union does not mean that it proposed to let the employer see the original cards and do its own counting. If the Union had meant to propose a cross-check by the employer, it would have said so. If what is meant is to submit the cards to some impartial person for a count, where could such a

person be found with the requisite knowledge and experience to make a proper count, in view of the fact that the count as made by the Board itself was full of errors, miscalculations and ambiguities, as we have already demonstrated? How would the impartial person, perhaps a priest, a minister or a rabbi, know whether to go by the dates on the face of the cards or the dates on the back? How would he know the correct number of persons in the unit? If he counted as of February 9, 1967, which is the most natural date to select, he would come out with the answer that the Union did not have a majority. Above all, how would he know what representations had been made, and what relevant factors had been concealed by the union organizers? The whole thing is absurd. The plain truth of the matter is that the offer of proof is of no consequence whatever in this case. The employer had no alternative other than to disregard it.

While the Trial Examiner concludes that the asserted reasons for withholding recognition "have no basis in fact," we are of a contrary view.

F.

Is the Bargaining Order in This Case an Appropriate Remedy for Enforcing the Policy of the National Labor Relations Act?

What do all these miscalculations and errors of fact and law by the Board add up to? Surely they do not support the widely held supposition that the Board and the Trial Examiners have a special expertise to handle this type of case. This "representation" card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be by-passed and the Unions ushered

in without giving the employees individually or collectively any voice in the matter. And this is accomplished by the invention of new *per se* rules of evidence and new standards by which the proofs are to be evaluated, that fly in the face of common sense and elementary concepts of justice and fair play.

The very keystone of the Act is Section 7.

Rights of Employees

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The invention and implementation of a scheme by which employees can be befuddled into thinking they are asking for a free election at which each can cast a secret ballot either for or against the Union, whereas they are in fact held to be signing away this very right without knowing they are doing so, seem to us to be a clear violation of Section 7. By the same token the bargaining order in this case nullifies the beneficent purposes of the Act and in no possible way can be said to effectuate the purposes of the Act. The forgotten man seems to have been the employee who was one of those who comprised the unit of production and maintenance workers in the Company's Juniata Plant.

Part II

The Unfair Labor Practices.

We sustain and will enforce the Board's finding of a Section 8(a)(1) violation for having reprimanded employee Brown for Union activities during working hours, and we also sustain and will enforce the Board's finding of a Section 8(a)(2) and (1) violation for establishing, and then dominating and supporting the Employee Committee after the election. We set aside and refuse to enforce all the other findings of unfair labor practices by the Company as not supported by substantial evidence on the record as a whole. Each of these findings will now be discussed in some detail.

A.

The Meetings With Small Groups of Employees.

Some weeks before the election, and with the election in mind, the management of the Company decided to hold a series of meetings with small groups of the employees, sometimes with 5 to 7 employees, sometimes with as many as 8 to 10 employees in attendance. The issue is whether or not the discussions at these meetings interfered with, restrained, or coerced the employees in the exercise of their Section 7 rights.

In this Circuit the controlling authority is *Bourne* v. *N. L. R. B.*, 332 F. 2d 47 (2d Cir. 1964), where we held, at page 48: "Under our decisions interrogation, not itself threatening, is not held to be an unfair labor practice unless it meets certain fairly severe standards." Five factors are frequently relevant: (1) whether there is a record of employer hostility; (2) is the information such as to have a potential use against an individual employee; (3) the

identity of the questioner; (4) is there unnatural formality in the place and manner of interrogation; and (5) the truthfulness of the replies.

Before applying these standards it is well to bear in mind that the meetings with small groups of employees were dialogues rather than interrogations. What management was trying to accomplish had a double aspect: (1) to ascertain from the employees what their gripes and complaints were; and (2) in the context of a discussion of what the employees thought the Union could do for them in the light of these complaints, to counter the arguments put forth by the Union in its books and pamphlets and by word of mouth. The employees had no reluctance to voice their complaints. Indeed, in many instances these were stated with some enthusiasm. Randy Thompson, one of the members of the Union Committee and a strong Union supporter, testified that the method pursued by Taylor was to read from a book that had been passed out at the gate by the Union "something about the booms are dropping," and then comment on what he had read in order to give the Company's point of view on the particular subject covered by the quotation. Naturally and properly the Company took the position that the employees should cast their secret ballots for the Company and against the Union. Under these circumstances, assurances against reprisals would have been wholly inappropriate. Moreover, the fact that the discussions were held with small groups rather than with individuals is a further support for the Company's position.

We proceed to apply the *Bourne* standards:

(1) In this case there is no record whatever of hostility to the Union.

(2) There were no threats, direct or indirect, to discharge any employee nor was any employee discharged. Indeed, we can find nothing in this record to support the view that any of these dialogues was designed to probe for information that could be used against any of the employees. There was no grant of benefits to the employees.

(3) Those who conducted these discussions varied, generally Taylor, the Plant Manager or Vice President Elden or both were present. Lewis and Rabenstein were also present at some of the meetings. Lewis was the training manager and foreman of the third shift. Rabenstein was standards engineer and responsible for the "method time measurement" system. Both were properly found by the Board to be supervisors. Taylor, Lewis and Rabenstein were in constant day-to-day contact with the employees, Elden also but to a lesser degree. There is no indication that any one of these three appeared as a formidable personality who was held in awe by any of the employees. The discussions appearing in the record seem to have proceeded on the part of the employees in a natural and quite candid and uninhibited way.

(4) As above indicated the dialogues proceeded in the most informal manner. But the place where they were held was the subject of extended testimony and discussion at the hearing. This was because the Union was trying to make it appear that the room had the stamp of high-level management and discipline upon it in such fashion as to overawe the employees. While in one sense this room could be called the conference room, this is only because there was in it a conference table surrounded by 8 chairs. In fact the employees were constantly in and out of this room, as it contained the desks of Grossman and Kozak, a sick

room or dispensary, the Xerox machine and certain files. It seems to us that the only reason this room was chosen for the meetings is that it was the most convenient room in which to hold such discussions. This was a familiar and reasonably quiet area and it was certainly not a clearly demarked, seldom-entered management province.

(5) The truthfulness of the replies to questions is supposed to indicate the fear or lack of fear or inclination to evasion experienced by the employee. Here the readiness of the employees to discuss their gripes dispels any notion of fear. The whole atmosphere is epitomized in employee Melvin Kintz, Jr.'s testimony that, at one of these meetings he was asked why he needed a union to speak for him since he spoke so well for himself, and he replied that it didn't matter how well he spoke for himself if nobody in authority would listen.

The finding of interference, restraint or coercion of employees by these group meetings is wholly unsupported by substantial evidence on the record as a whole. Indeed, unless an employer can in some such fashion as in these group meetings put its side of the case before its employees just prior to an election, the Union with its professional organizers such as Frazier and Meyers, and its books, leaflets and pamphlets, would have the field to itself.

B.

The Alleged Threat to Close the Plant.

This is the most serious and the closest issue before us. Schwarzenbach, the President of the Company, had not, at least for some years, addressed his employees. In what he had every reason to suppose was a critical hour he ad-

dressed them in several shifts a few days before the election. Here are some excerpts from his speech:

> To say I am concerned about the future of the mill is putting it mildly.
>
> That he had invested a lot of money in the plant, that he could easily sell it or lease it to a company like Sylvania.
>
> That it was an old company, which had been in the area for a long time, that the plant had gotten along without a union, and that if the Union got in or failed to get in "they were going to try to make a go of it either way."
>
> A few employees testified that Schwarzenbach said he would try to keep the plant going if the Union won, but he didn't see how he could do it.

Schwarzenbach also made reference to the permanent closing in 1953 of the Altoona Rayon plant.

On March 2, 1967 the Company issued to its employees a single-sheet cartoon showing a sketch of its Juniata plant with the following in large print:

> We have, here in Altoona, one of the finest textile mills in the world . . . South Carolina not excluded. (Don't let's wreck it now!)

Below this heading is a sketch of a plant in ruins, with the subhead: "Remember Altoona Rayon?"

The gist of what remains to support this charge of threatening to move the plant is contained in the following quotation from Schwarzenbach' letter of March 9, 1967 to the employees:

> No matter what the TWUA may promise you, the Juniata record is a darn good one. Compare your

wages, your holidays, your benefits, to industry figures, *to those in our own Front Royal mill for that matter!* Look at Juniata's 20-year record of around-the-clock employment. And the TWUA? *Why isn't there a single major textile operation left in the northeastern states?* Is that the kind of job security the union keeps talking about?

Why is it that today virtually all our competition is located in the South? Simple enough! The mills down there feel safe from the bickering, dissension and unreasonable demands that come with the TWUA. *Remember Altoona Rayon?*

Virtually all of Stehli's fabric requirements now are being woven down south. These are fabrics which for many a year were mounted on Juniata looms. Those same southern mills are just waiting to supply Mr. Hommel with every yard of computer fabric he requires. *For Juniata there is no alternative but to again become competitive.* (Emphasis in original.)

It was stipulated that Altoona Rayon had closed its plant permanently in 1953 while under contract with the Textile Workers Union of America, the Union involved in this case.

There are occasional references in some of the group meetings to the possibility that the mill might be closed. The Trial Examiner reports an instance in which Taylor referred to the "New England" plant closing down because it could not compete, and Randy Thompson asked him point blank "if he was saying the Union caused them to close down," to which Taylor replied, "You said that, not us." In a similar incident employee Kintz testified that Elden replied, "I'm not allowed to say that." In another incident, employee Wilson testified that Rabenstein was worried be-

cause, if the Union got in, it could possibly mean his job and many others. We give these peripheral facts solely for the sake of completeness. The real thrust is in the speeches, the cartoon and the letter of March 9, 1967, supplemented by Schwarzenbach's letter of March 20, 1967, after the election, in which he stated, "what actually was at stake was the future of the mill and the long-term security of your job."

We thus approach the sensitive area of First Amendment rights of free speech where in a variety of contexts the Supreme Court has urged that these preferential rights be preserved. In particular we are to decide whether what was said and written on behalf of the Company exceeded the bounds of lawful expression within the meaning of Section 8(c)[9] of the Act, which was a new provision and became part of the Taft-Hartley Act in 1947. We follow and reaffirm the rationale of *N. L. R. B.* v. *Golub Corporation,* 388 F. 2d 921 (2d Cir. 1967), in which our Brother Friendly illuminated the text with a most helpful sketch of the historical background of Section 8(c).

Thus, the test is whether the fears expressed by Schwarzenbach were "shown to have so far transcended the bounds of reason as to justify the Board in finding them to be disguised threats of reprisal." 388 F. 2d at page 929. Doubtless a good faith doubt or prediction "could so far outrun any possible basis for it" as to justify the Board in concluding that a threat was intended. 388 F. 2d at page 928.

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9 Sec. 8(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

What was the crisis that impelled Schwarzenbach to write in his letter of March 9, 1967: "To say that I am concerned about the future of the mill is putting it mildly"? The answer is to be found in the letter, which according to the teaching of *Golub*, and of common sense as well, must be taken in its entirety. Thus viewed, and we have reproduced the letter in the margin,[10] the crisis was an economic

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10 (Letterhead of The Schwarzenbach Huber Co.,
470 Park Avenue South, New York, N. Y. 10016)

March 9, 1967

Dear Employee:

The Juniata mill has been through a number of crises in its 54-year history. None, however, do I consider as serious as the one it faces right now. To say that I am concerned about the future of the mill is putting it mildly.

About three years ago, after more than a decade of progress and steady employment, performance at Juniata began to slip. To make matters worse, at about the same time our main product, off-loom acetate fabrics, began losing favor with the consumer. Our largest customer, Stehli, under severe competitive pressure, began checking around for another source of these fabrics. A year ago they discovered that a better quality piece of goods could be purchased, at a lower price, from that southern giant, J. P. Stevens. Since that day Stehli orders have been few and far between.

Juniata, to survive, now required not only lower costs and fewer seconds, but a new product! Fortunately, our typewriter and computer ribbon sales had been growing slowly but steadily. Here possibly was the product! Last spring it was decided to strip Front Royal of these constructions and concentrate all nylon weaving at Juniata. We believed a solution had been found, but alas our troubles had only begun!

Most of you will remember last summer's chaos at Juniata. Low efficiency, terrible quality, poor earnings, all of which led to astronomical financial losses to the company. Worst of all, we were no longer delivering goods to our customers.

In desperation, our Industrial Fabrics Division repeatedly requested permission to have their goods woven on the outside. My answer this time was no for I knew that once these fabrics were handed over to a southern mill they would never again be woven at Juniata. *Without this work the mill was dead!*

Just when things look blackest, efficiency and quality started to pick up. By the end of the year the mill was back under reasonable control and all of us in New York heaved a sigh of relief. Though costs were still a long way from what they will have to be, and seconds still a burden, we were back in business and once again shipping goods to

one. The mill had been through a number of such crises in its 54-year history. The mill had been losing money, and Schwarzenbach gives chapter and verse, mentioning details that no man in his senses would have dared to state if they were fabrications, as the employees knew these facts as well as he did. Was it mere fiction that virtually all

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our customers. Many of us believed that enough time had been gained in which to buckle down and improve overall mill performance.

This was not to be. A group of hotheads among you has now decided to exploit a situation which for over a year has been highly explosive. This group tells you that by joining the TWUA you will be getting better earnings, better working conditions, better benefits and, of course, job security!

With 20 years of this business and numerous union elections (3 of them right in Juniata) under my belt, I know all this to be empty promises. *It has long been Company policy to pay at Juniata as well or better than our competitors.* If a raise, additional benefits, pensions, or whatever are truly in the cards, then you will get them! For this you need no TWUA, no $60.00 a year deducted from your pay-check. What you will not get and what the TWUA cannot get for you are benefits that lead to excessive costs. *No company can survive selling its product at a loss,* and this is exactly what we have been doing these last 8 months.

No matter what the TWUA may promise you, the Juniata record is a darn good one. Compare your wages, your holidays, your benefits, to industry figures, *to those in our own Front Royal mill for that matter!* Look at Juniata's 20-year record of around-the-clock employment. And the TWUA? *Why isn't there a single major textile operation left in the northeastern states?* Is that the kind of job security the union keeps talking about?

Why is it that today virtually all our competition is located in the South? Simple enough! The mills down there feel safe from the bickering, dissension and unreasonable demands that come with the TWUA. *Remember Altoona Rayon?.*

Virtually all of Stehli's fabric requirements now are being woven down south. These are fabrics which for many a year were mounted on Juniata looms. Those same southern mills are just waiting to supply Mr. Hommel with every yard of computer fabric he requires. *For Juniata there is no alternative but to again become competitive.*

Not too long ago this very mill of ours was probably the finest filament mill in the country. Of late, it has been having more than its share of troubles. In the hope of finding solutions, many a change has been made. Occasionally this may have led to some dissension and misunderstanding between us. But let us not be discouraged! Like you, management seeks nothing other than a better, more competitive mill

the Company's competitors had moved South, and that the Altoona Rayon mill had followed their example? The employees knew better than that; and it is also a matter of general common knowledge. The employees knew, as does everybody else, that union demands often cause increased costs which render it difficult or impossible for management to continue operating an enterprise that is already losing money.

While Schwarzenbach's speeches were made extemporaneously and were not reported, they also must be taken as a whole, and there is no reason to doubt that the substance of the speeches is reflected in the contents of the letter of March 9, 1967.

The Company had taken care to avoid a single statement by anyone connected with management that the Altoona Rayon plant was forced by the Union to go South. That is the significance of Elden's response to a question at one of the group meetings: "I'm not allowed to say that." In fact, the stipulation shows that this very Union, The Textile Workers of America, had a contract with Altoona

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which can then again offer *true* job security to you all. This is the way to achieve better wages and benefits for all.

Many of you have known me for a long time. I have always been partial to this Juniata mill. I have never wilfully misled you. I am convinced that the Company record justifies your confidence. Now, as in the past, I firmly believe you have *absolutely nothing to gain* by voting in the union.

Be Sure To Vote, But Let It Be A
Resounding "No" On March 16th.

Sincerely,

THE SCHWARZENBACH HUBER COMPANY
/s/ ROBERT M. SCHWARZENBACH
Robert M. Schwarzenbach
President

RMS:MM

(Emphasis in original.)

Rayon for seven years before it moved in 1953. Certainly that plant could not have closed its doors as a reprisal against unionization.

We have studied this record, including all the exhibits, with the greatest care, and we find absolutely nothing to indicate antagonism or hostility toward this Union or any union. The most substantial of the findings of Unfair Labor Practices we have set aside. Of the two remaining findings of Unfair Labor Practices, that we will enforce, the first was the inconsequential Brown incident, to be described presently, and the other was the formation of the Committee, after the election and many months after the sending of the letter of March 9, 1967. And the Committee was voluntarily disbanded by the Company not long after it was established and commenced to function. Under all these circumstances, there is nothing to support an inference that the references to the possibility of moving South were intended to or in fact did constitute a threat to retaliate by closing the plant if the Union won the election. To paraphrase the statement in *Golub*, 388 F. 2d at page 928, "The only fair reading is that the employer would take these steps solely from economic necessity and with regret."

Nor do we find anything to the contrary in *N. L. R. B.* v. *Miller*, 341 F. 2d 870 (2d Cir. 1965). There this Court evidently thought the views expressed by the employer so far outran any possible basis for what was said as to justify the inference that a threat of reprisal was intended. This is not such a case. And we reaffirm the statement in *Golub*, 388 F. 2d at page 928, that the principle of *Miller* as above stated "is a principle that must be kept within narrow limits."

We conclude that the references to the possibility of moving South in the Schwarzenbach speech and in the letter

of March 9, 1967 and elsewhere did not constitute, within the meaning of Section 8(a)(1), and Section 8(c), a threat that the Company would retaliate by moving South if the Union won the election. We set aside the finding of the Board that these communications violated Section 8(a)(1) and we refuse to enforce it.

C

The Alleged Threat to Bargain From Scratch.

Employee Massini testified that Taylor told her that if the Union got in "The slate would be wiped clean. The Company would start bargaining from scratch with no paid holidays or vacations."

This is an isolated instance. It goes contrary to all the discussions that had been going on for weeks in the group meetings where the constant subject of the dialogue between Taylor and various employees related to the bargaining process whereby the Union if elected would or could meet the gripes of the employees.

The alleged interview was first with Grossman who at Massini's request asked Taylor to come down and they both talked to her. When her affidavit given to the Board was produced on cross-examination it appeared, so far as we can make out from the transcript, that Massini had attributed to Grossman what she testified was said by Taylor. When counsel for the Company offered the affidavit as impeachment, this was met by the objection, which is not intelligible to us, that such matters did not constitute "contradictions," and the affidavit was not admitted. Both Grossman and Taylor denied making any statement about "bargaining from scratch" but the Trial Examiner credited

Massini's version. Nevertheless, it seems highly improbable that Taylor would make such a statement.

We think, in the context of the entire testimony, that in this instance also the Trial Examiner reached an erroneous conclusion. We set aside and refuse to enforce this finding of Section 8(a)(1) violation as not supported by substantial evidence on the record as a whole.[11]

D

The Conversation Between Lewis and Bradley About Bumping.

Just about scraping the bottom of the barrel the Trial Examiner charges as a separate violation of Section 8(a)(1) a conversation between supervisor Lewis and employee Bradley. These two were old and constant, intimate friends. Each was the best man at the other's wedding. All this conversation amounts to is that Lewis, in the conversation with Bradley, referred to some of the group sessions in which some of the employees got the impression, or it was rumoured that "there was going to be bumping in every department on the floor and also, there was going to be several bosses replaced." As he knew Bradley was strong for the Union and he suspected Bradley would be President of the Union if the Union won the election, Lewis asked Bradley if there was any truth in these rumours. Bradley replied: "I attended all the union meetings and not once did I hear any mention of any bosses being replaced." Bradley also

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11 And see *Bauer Welding & Metal Fabricators, Inc.* v. *N. L. R. B.*, 358 F. 2d 766 (8th Cir. 1966); *Surprenant Mfg. Co.* v. *N. L. R. B.*, 341 F. 2d 756 (6th Cir. 1965); *Hendrix Mfg. Co.* v. *N. L. R. B.*, 321 F. 2d 100 (5th Cir. 1963). See also *Irving Air Chute Co.* v. *N. L. R. B.*, 350 F. 2d 176 (2d Cir. 1965).

told Lewis that he had no intention of being President of the Union.

How this disposition of an idle rumour running around the plant can be inflated into an Unfair Labor Practice is beyond our comprehension. We set aside this finding of violation of Section 8(a)(1) and refuse to enforce it. This is included in the general catch-all of Conclusion 7 of the Trial Examiner's decision, adopted by the Board. The various findings of Unfair Labor Practices in violation of Section 8(a)(1) are so scrambled and fragmented in the decision of the Trial Examiner that we may have missed one or two minor items, but we think not.

E

The Reprimand Administered to Clyde Brown.

While the incident is not one of great consequence, we think the Company did discipline Brown for soliciting for the Union in the plant during working hours, whereas it had previously followed a very liberal policy of permitting, at least on one occasion, solicitation for other than union purposes during working hours. We sustain this finding of violation of Section 8(a)(1) and will enforce it, as modified by the Board. This is the only one of the alleged violations of Section 8(a)(1) summarized in Conclusion 7 of the Trial Examiner and adopted and modified by the Board that we sustain and will enforce.

F

The Employee Committee.

After the election the Company thought it was a good idea to form an Employee Committee with rotating groups

of employees to bring complaints of the employees to the attention of management and assist in a proper, just and equitable processing of these complaints. The Company chose the employees who were to serve on the Committee, paid them for the time they spent on the business of the Committee and controlled the whole affair. This was a clear violation of Section 8(a)(2). There is no doubt that the Committee was a Labor Organization as defined in the Act. We sustain this finding of the Board and will enforce it, despite the fact that the Company voluntarily disbanded this Committee on July 27, 1967. This is Conclusion 6 of the Trial Examiner, adopted by the Board.

We permit the order setting aside the election to stand, not for the reasons given by the Board, but because we think it is better for all concerned to have a new election, if either the Union or the Company so desires.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23756

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

J. M. MACHINERY CORPORATION,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board (Florida Case)

(April 9, 1969)

Before BROWN, Chief Judge, COLEMAN and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: In November of 1964, ten of fourteen employees of J. M. Machinery Corporation (hereinafter Company) signed union authorization cards. On November 29, 1964, the Union's[1] representa-

[1]International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO Local 609.

tive sent a letter to the Company asserting that the Union represented a majority of the Company's employees, requesting recognition, and offering to demonstrate majority status through a card check by a third party. The Company did not reply but four weeks later stipulated to a Board-conducted election. The Union first filed an unfair labor practice charge during the course of the election campaign and filed additional charges after the election which the Union lost seven to six with one vote challenged. The Regional Director sustained the charges and set the election aside. The Union thereupon filed a refusal to bargain charge which has led ultimately to this appeal.

After a hearing, the Trial Examiner found that through coercive interrogation, threats, wage increases, and promises of both an employee's policy handbook and employer-employee grievance sessions the Company had violated Section 8 (a) (1) of the Act, Title 29 U.S.C., Sec. 158 (a) (1). He found further that by signing authorization cards a majority of the employees validly authorized the Union to represent them. The Trial Examiner thus concluded that the refusal to bargain on and after November 29, 1964, was motivated out of a bad faith attempt to dissipate the Union's majority and consequently was a violation of Section 8 (a) (1) and (5) of the Act, Title 29 U.S.C., Sec. 158 (a) (1) and (5). The Examiner's recommended order directed the Company to cease and desist its unfair labor practices, to post notices, and to bargain with the Union upon request. The Board's order, reported at 155 N.L.R.B. 860, affirmed the Trial Ex-

aminer's order and substantially adopted his findings, conclusions and recommendations.[2] The Board's petition for enforcement followed. The order will be enforced in part and denied in part.

I.

THE 8 (a) (1) VIOLATIONS

We find that there is substantial evidence in the record as a whole to support the Board's conclusion that the Company had engaged in unfair labor practices in violation of Section 8 (a) (1) of the Act. Universal *Camera Corp. v. N.L.R.B.*, 1950, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456. Specific itemization of the evidence would serve little purpose here. Succinctly stated, the evidence indicated threats of moving the plant if the Union came in, of dismissal and of surveillance, promises of benefits and of financial help, wage increases to the two lowest paid employees, and unlawful interrogation of the employees.[3]

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[2]The Board included the card of Richard Wood in the Union's majority while the Trial Examiner excluded Wood's card. This made the election results stand at nine for and five against union representation. See Note 5. The Board also stated additional grounds for finding that James Myers was a supervisor.

[3]The Company asserts that it is entitled to make inquiries of its employees in order to ascertain their union views. While such an inquiry is proper, it can only be accomplished under carefully prescribed circumstances. Such controls were not exercised in the present case, accordingly the unlawful interrogation finding was proper. See *International Union of Operating Engineers, Local 49 v. N.L.R.B.*, D.C. Cir. 1965, 353 F.2d 852. See also the Board's decision on remand. *Struknes Construction Co., and International Union of Operating Engineers, Local 49*, 1967, N.L.R.B. 102, in which the Board enunciated five conditions which must be met before polling of employees may be classified as lawful.

One potentially troublesome point raised here is the factual determination of the status held by employee James Myers. Nine of the thirteen unfair labor practice violations that occurred were attributable to Myers. Predictably, the Company asserts that it should not be held responsible for Myers' conduct because he did not hold a supervisory position. Whether or not an employee is a supervisor is a question of fact and the Board's resolution of the issue is conclusive if supported by substantial evidence. *Trailmobile Division, Pullman, Inc. v. N.L.R.B.*, 5 Cir. 1967, 379 F.2d 419; *Peoples Service Drug Stores, Inc. v. N.L.R.B.*, 6 Cir. 1967, 375 F.2d 551; *N.L.R.B. v. Griggs Equipment, Inc.*, 5 Cir. 1962, 307 F.2d 275. The Board's finding that Myers was a supervisor is primarily based on the credibility determinations of the Trial Examiner who credited the testimony of the employees over that of the Company officials. "It is generally held that whether made by jury, judge, or agency a determination of credibility is non-reviewable unless there is uncontrovertible documentary evidence or physical fact which contradicts it". *N.L.R.B. v. Dixie Gas, Inc.*, 5 Cir. 1963, 323 F.2d 433, 437. See also *N.L.R.B. v. Plymouth Cordage Company*, 5 Cir. 1967, 381 F.2d 710; *Great Atlantic & Pacific Tea Company v. N.L.R.B.*, 5 Cir. 1966, 354 F.2d 707; *N.L.R.B. v. Camco, Inc.*, 5 Cir. 1965, 340 F.2d 803, cert. denied 382 U.S. 926.

The Board's findings based largely on the employees' testimony are summarized below. Myers recommended several employees for hire and those men were subsequently hired. Company officials presented Myers to the men as Foreman and superintendent. On

at least one occasion, Myers was involved in the disciplining of an employee. When employees wanted time off from work, they notified Myers. He assigned the men work and gave them instructions. The Company president asked Myers to help evaluate the employees' feelings about the Union and Myers rather zealously complied with the request.

We conclude that substantial evidence supports the Board's finding that Myers was a supervisor[4] and that the Company was responsible for his acts. In view of this holding it is not necessary to consider the Board's alternative theory, which briefly stated was that because the employees reasonably regarded Myers as representing management policy, the Company should be responsible for his acts even if Myers was not a supervisor.

II.

THE 8 (a) (5) VIOLATIONS

The more difficult question presented by this appeal is whether the Board properly found that the Company violated Section 8 (a) (5) of the Act by refusing to bargain with the Union on and after November 29, 1964. The Trial Examiner's order which the Board adopted held that the Company in bad faith refused recognition in order to gain time to undercut the Union's majority. As evidence of bad faith, the Board

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[4]For a discussion dealing with the definition of supervisory status, see *NLRB v. Security Service Inc.*, 5 Cir. 1967, 384 F.2d 143.

relied solely on the numerous Section 8 (a) (1) violations. It is axiomatic that a company may not be found to have refused to bargain in bad faith if at the time of the union's request, the union did not have a majority. *A.T.T. Semi-Conductors, Inc. v. N.L.R.B.*, 5 Cir. 1968, 395 F.2d 257; *N.L.R.B. v. Southland Paint Company, Inc.*, 5 Cir. 1968, 394 F.2d 717; *N.L.R.B. v. Lake Butler Apparel Company*, 5 Cir. 1968, 392 F.2d 76; *N.L.R.B. v. Peterson Brothers, Inc.*, 5 Cir. 1965, 342 F.2d 221. Thus we must first determine if the Board was correct in finding that the Union had a majority at the time of its demand.

Here the conclusion of the Board that a majority status was demonstrated in spite of the Union's loss in the election is based solely upon the fact that a majority of the employees had signed authorization cards.[5] The Board found that the cards were unambiguous because they contained no mention of an election and plainly stated that the employee was authorizing the

[5]Of the appropriate unit of fourteen employees, ten signed cards. The Trial Examiner excluded two of these cards. Employee Pope's card was not counted because he had not signed a card until April, 1965, four months after the election. Employee Wood's card was eliminated because the Trial Examiner found that he had a strong company bias and would have voted against the Union even if no unfair labor practices had occurred. The remainder of the cards were held to be valid authorizations by the Trial Examiner thereby giving the Union a majority of one, eight of fourteen. The Board agreed with the exclusion of Pope's card but counted Wood's. The basis for the Board's inclusion of Wood's card was that in view of the unambiguous nature of the card and the thorough explanations of the consequences of signing the card, the Trial Examiner improperly considered Wood's subjective intent and should not have speculated as to how Wood would vote.

Union to be his collective bargaining agent. The Board found further that there was no evidence of misrepresentation.[6] Therefore the Board applied its usual rule that valid authorization cards may not be questioned. Thus the Board concluded that inquiry into the thoughts and afterthoughts of the signer need not be made. *Joy Silk Mills, Inc. v. N.L.R.B.*, D.C. Cir. 1950, 185 F.2d 732, cert. denied 341 U.S. 914, 71 S.Ct. 734, 95 L.Ed. 1350; but see *N.L.R.B. v. Southland Paint Co.*, supra at 724; *Edward Fields, Inc. v. N.L.R.B.*, 2 Cir. 1963, 325 F.2d 754.

Because of their frequent unreliability[7] this Court scrutinizes with great care authorization cards which

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[6]It is apparent from the quoted language below that the Trial Examiner used the doctrine of *Cumberland Shoe*, 1963, 144 N.L.R.B. 1268, enforced, 6 Cir. 1965, 351 F.2d 917, to test whether or not there had been misrepresentation in the procurement of the cards. "Other witnesses testified that the Union leaders at the meeting did not indicate that the cards would be used *only* for an election. . . ." ". . . . I find that the employees were not told before they signed, the cards were *just* for an election. . . ." (Emphasis added). Although the Trial Examiner cited no authority for the above statements, they are principled upon the *Cumberland Shoe* doctrine which holds that a card can only be invalidated when the employee is told that the card is for the sole purpose of obtaining an election. This circuit has rejected this test. See *N.L.R.B. v. Lake Butler Apparel Company*, supra; *Engineers & Fabricators, Inc. v. N.L.R.B.*, 5 Cir. 1967, 376 F.2d 482.

[7]For a discussion of the reliability problem, see *N.L.R.B. v. Southland Paint Co.*, supra; *N.L.R.B. v. S.S. Logan Packing Company*, 4 Cir. 1967, 386 F.2d 562; Comment, Union Authorization Cards, 75 Yale L.J. 805 (1966). We note also that the United States Supreme Court has recently granted certiorari at 393 U.S. 997, — S.Ct. ——, 21 L.Ed.2d 462, in two cases, *N.L.R.B. v. Gissel Packing Co.*, 4 Cir. 1968, 398 F.2d 336 and *Sinclair Co. v. N.L.R.B.*, 9 Cir. 1968, 397 F.2d 167. These cases present the question of whether or not an employer, because of the alleged inherent unreliability of authorization cards, is justi-

form the basis of a majority claim. We think the test enunciated in *N.L.R.B. v. Peterson Brothers Co.*, supra, is a good and fair legal standard, i.e. "the Board must establish that the signer of the card did, in effect, do what he would have done by voting in a Board election". This rule protects the vital interest in the selection of a bargaining representative — employee free choice. Accordingly to help determine if such a choice has been made, this Circuit has held that an inquiry into the subjective intent of the signer must be made in at least two instances: first, when the only proof of union majority is ambiguous authorization cards, *I.T.T. Semi-Conductors, Inc.*, supra; *N.L.R.B. v. Southland Paint Co.*, supra; *N.L.R.B. v. Peterson Brothers, Inc.*, supra; second, when unambiguous cards are challenged with proof of misrepresentation in their procurement. *N.L.R.B. v. Tex. Elec. Cooperatives*, 5 Cir. 1958, 398 F.2d 722; *N.L.R.B. v. Lake Butler Apparel Co.*, supra; *Engineers & Fabricators, Inc. v. N.L.R.B.*, supra.

Our immediate task then is to determine if the authorization cards are free from the ambiguities found in the cards used in *I.T.T. Semi-Conductors*, supra, *Southland Paint*, supra, and *Peterson Brothers*, supra. After comparing the three cards used in these cases, we conclude that the card in the present case is less ambiguous than those used in *I.T.T. Semi-*

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fied in refusihg to bargain when the only proof of a union's majority is authorization cards. The Supreme Court's determination of that issue will have little effect on the case at bar because here the cards were obtained through misrepresentation whereas there is no issue of misrepresentation in the cases which the Supreme Court has under consideration.

Conductors and *Peterson*, but contains the same ambiguity as Judge Wisdom found in Southland. For the purposes of comparison the texts of the two cards are set out below.[6]

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[6]The *Southland* card read as follows:

THE LAW OF THE UNITED STATES PROVIDES THAT workers have the right to designate a union to represent them for the purpose of collective bargaining with their employer.

AUTHORIZATION

NAME _____

ADDRESS _____ CITY _____

EMPLOYER _____

AREA _____ SHIFT _____ CLASSIFICATION _____

I hereby designate and authorize the Oil, Chemical and Atomic Workers International Union AFL-CIO, as my collective bargaining agent in all matters pertaining to wages, rates of pay and conditions of work.

_____

Signature

Date _____

WITNESS _____

CONFIDENTIAL: Neither your employer nor his representative will see this signed authorization card.

The card used in the case at bar reads:

AUTHORIZATION FOR REPRESENTATION

(This is not an application for membership).

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO.

Fill in all blanks Date _____

I The undersigned employee of _____

_____

(name of company)

hereby select the above named Union as my collective bargaining agent.

Name of Employee _____

Home Address (please print) _____

City _____

State _____

Phone _____

_____

Signature

The differences in the two cards are not significant. The *Southland* card has the sentence "THE LAW OF THE UNITED STATES PROVIDES THAT . . ." while the card in dispute has no such statement. The *Southland* card contains the "CONFIDENTIAL" phrase which is absent in the present case. The *Southland* card is silent as to the matter of membership while the card in the case at bar specifically states that it "is not an application for membership".

The similarities between the two cards on the other hand are highly significant. Neither card makes any mention of the election possibility. Neither card clearly states that if a majority of the appropriate unit sign the authorization cards, recognition may be obtained without an election. Neither card gives the impression of cruciality that one might expect if the signing of a card may serve as a substitute for an election. Judge Wisdom explained in *Southland* that the caveat of confidentiality contained in the card created the impression that the signing of the cards was not a crucial act, rather it gave the impression that the cards would form a basis for a secret election. We think the lack of an impression of cruciality is even more manifest here because the card contains the phrase "This is not an application for membership". It would be difficult for the average employee to understand that although he signs a card which plainly states that it does not make him a member, the union can use that same card to seek recognition without an election and if recognized, become his bargaining agent. Thus, the disclaimer of membership creates the impression that the act of signing was not in itself the critical

act and the resulting conclusion that the cards would form a basis for an election seems to be a reasonable and natural consequence. In sum, the words of Judge Wisdom in *Southland* seem uncommonly appropriate:

> *"Looking at the face of the card, we find it clearly states that the signer designated the union as the bargaining agent in the unit. But exclusions may be more telling than inclusions. If an authorization card is to be relied upon in lieu of an election, it is only fair for the cards to say so.* In the light of the solicitors' oral statements, the omission of such a statement was a misrepresentation of the purpose for which the card was to be used. We observe too that the card omits any reference to the signer's membership in the union. As the court said in *Nichols (N.L.R.B. v. S. E. Nichols Co.*, 2 Cir. 1967, 380 F.2d 438) this is 'one thing that an employee would readily understand.'" (Emphasis added)

To conclude, the card is ambiguous because it does not state the purposes for which it may be used and this ambiguity is further compounded by the non-membership disclaimer. To reiterate, if unions wish to perfect their majority claims on the basis of authorization cards they should do so with cards which clearly state their purpose.

Although we have held these cards to be ambiguous, our task has not ended. We must carefully examine the effect of signing within the context of solicitation in

order to determine if the employees understood what they were signing. *N.L.R.B. v. Tex. Elec. Cooperatives*, supra; *N.L.R.B. v. Southland Paint Co.*, supra. Thus we now turn to the facts and circumstances before us.

Five of the nine cards were signed after hours in the parking lot of the "Idle Hour" tavern. Former employee Ivan Harmon signed up four of the five men present.[9] All but one of the men testified that Harmon had told them that the cards would be used to obtain an election.[10]

After these men had signed, employee Hornsby arrived. He testified that he told the men that "it was not a membership card that it was strictly a card

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[9]Five of the seven cards signed at the "Idle Hour" meeting were ultimately counted as part of the Union's majority; i.e. those of Wood, Green, Griffin, Langston, and Hornsby. Two other men, Ivan Harmon and Sheffield, signed but were never counted as part of the Union's majority. The four men Harmon got to sign were Wood, Green, Griffin and Sheffield. Langston and Hornsby did not sign until later that evening.

[10]Harmon addressed the men individually rather than as a group. Harmon was not asked about what representations he made to the men. Langston, who did not sign until later, was also not asked about Harmon's solicitations. Employees Wood, an illiterate, Green and Griffin testified that Harmon told them that the cards would be used to obtain an election. Their testimony also reflected that they signed the cards to prevent anyone from getting mad at them and that they intended to make their decision at the election. However because of Wood's strong company bias his testimony was discredited by the Trial Examiner. Former employee Sheffield stated that Harmon told him that "it would take 30 percent to have an election but he didn't want an election . . . [T]he Union would get behind this thing if we got 50 percent".

which we had to have a majority of the people to sign in order to obtain recognition from the Company."[11] A short time later, Union representative Mills arrived and spoke to the men as a group. He testified that he explained that by obtaining fifty-one percent or better, a letter could be sent to the Company demanding recognition. Mills further testified that he made no mention of the election possibility. This then is a summary of the events which surrounded the card signing.

To further support the contention that the signers knew what they were signing, the following facts were relied on by the Board. Hornsby testified that he told Griffin on the day after the "Idle Hour" meeting that "[I]n two or three days you will probably see a man drive up here with a registered letter and the letter will be coming from a Union agent for representation — asking for immediate recognition". Further, the Board inferred that Griffin and Wood intended to authorize the Union as their bargaining agent in November 1964 because they signed the same kind of card in a second organization drive in April, 1965.

The presigning "Idle Hour" solicitation when coupled

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[11]The significance of the above statement is somewhat clouded by Hornsby's following testimony:

"Q. Had the subject of a letter been mentioned to the employees, a letter demanding recognition been mentioned to the employees the night before (the night of the 'Idle Hour' meeting)?

A. The night before, no, not that I know of.

Q. If it was mentioned, you did not hear it?

A. If it was mentioned I did not hear it."

with the ambiguous cards was misrepresentative.[12] We have previously noted the testimony of the employees relating to the representations made to them by the unsupervised solicitor, Ivan Harmon.[13] The significance of their testimony is not negated by the Trial Examiner's finding that "the employees were not told before they signed the cards that the cards were just for an election, and that on the contrary, they were told that the cards were for the purpose of obtaining Union representation". We interpret this statement to mean that before the men signed they were told that the cards would be used to obtain recognition without an election. If this were the case, we would apparently have no choice but to affirm under the *Southland* holding which stated at 394 F.2d 717, 730:

> "There is substantial evidence to support the finding that the Union solicitors in many instances explained that the cards designated the Union as the bargaining agent of the employees. Consistent with the examiner's premises, this finding was enough to justify the examiner's conclusion that the solicitors did not rep-

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[12]The Company asserts that the cards of Griffin, Green and Wood were not valid authorizations. If its contention is correct as to any two of these men, the Union's majority is destroyed. Thus the whole dispute centers around these men. Consequently the following shorthand terminology will be used. The representations made to the men by Ivan Harmon will be referred to as the "presigning solicitation" period because the men signed the cards after his solicitation. The representations by Hornsby and Mills which were made subsequent to the signing shall be designated as the "post-signing solicitation" period.

[13]See Note 10.

ment to the signers that the cards were *solely* for an election."

However the record clearly indicates that the statements concerning recognition without an election came after the men had signed.[14] The record reflects that only Wood, whose testimony was discredited, Griffin, Green and Sheffield testified as to the representations made by Ivan Harmon. Their testimony indicates that they were only told that a purpose of the cards was to obtain an election. Their testimony (with the possible exception of Sheffield's) gives no indication that Harmon informed them of the no election possibility. Thus if there was no mention of Union representation without an election, the fact that the men were not told that the sole purpose of the card was to obtain an election does not indicate that no misrepresentation occurred.[15] As a result, the Trial Examiner and the Board committed errors of fact and law. First, there is no substantial evidence to support their conclusion that the men were informed before signing that the signing of the cards authorized possible Union repre-

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[14]The only evidence which can possibly be construed as apprising the employees of the no election possibility is the testimony of Sheffield which we have previously quoted. See Note 10. Even if Harmon's comments to Sheffield were interpreted as informing Sheffield that recognition could be secured without an election it carries little weight with reference to Wood and Griffin because Sheffield testified that he could not vouch for what was said to anyone else. The other evidence supportive of the inference that the men knew about the no election possibility is the testimony of Hornsby and Mills. Undeniably their testimony dealt with events which occurred after Wood, Griffin and Green had signed.

[15]See Note 6.

sentation without an election. Second, they applied the wrong legal standard in determining if there was any misrepresentation, i.e. the sole purpose test. *N.L.R.B. v. Southland Paint Co.*, supra; *N.L.R.B. v. Lake Butler Apparel Company*, supra; *Engineers & Fabricators, Inc. v. N.L.R.B.*, supra.

In sum, the record reflects that the men signed ambiguous cards which were solicited by an unsupervised employee who at least told them that a purpose (as distinguished from the sole purpose) of the cards was to hold an election. These facts are remarkably similar to those found to be misrepresentative in *Southland*. Consequently, if this were all that was involved in the case we could deny enforcement without elaboration under the *Southland* authority. However the events, previously outlined, which occurred after these men signed necessitates closer examination.

Essentially we are faced with the following question: Were the representations, made after the cards had been signed, sufficient to clear up the possible misunderstanding created by the ambiguous cards and Harmon's solicitation? Apparently this is a novel question as our research indicates no factual parallel. Indeed neither the Board nor the Company dealt with this problem. The Company's focus was upon the ambiguity of the cards which is understandable in view of the fact that *Southland* was decided after the submission of its brief. The Board simply failed to delineate between presigning and post-signing solicitation.

However, the dicta in the Board's order[16] suggests the one possible theory supportive of the conclusion that the post-signing declarations were sufficient to eliminate the doubt as to the employees' intent created by the presigning misrepresentation. The theory is that if the employees did not intend to authorize union representation, they, upon learning of the cards' true purpose, would have revoked their authorization. Thus the absence of revocation under this theory is a clear indication of the employees' intent. The logical extension of this concept is that unrevoked cards should be counted as part of the union's majority, even though the initial signing had been procured by the use of ambiguous cards and misrepresentative statements, if after the signing, the union officials unambiguously and without misrepresentation explained the purposes of the cards.

While we do not discount for all purposes the significance of the lack of revocation by employees, severe practical consequences foreclose the acceptability of the theory that the lack of revocation coupled with the proof of the making of post-signing curative declarations is sufficient to sustain the burden of proof as to the signers' intent. First, the natural reluctance of an employee to go against the wishes of his fellow employees casts significant doubt as to the probative value of the lack of revocation. The Fourth Circuit in *N.L.R.B. v. S. S. Logan Packing Company*, supra, at 556, made mention of this problem:

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[16] "The card signed by Wood in November 1964 expressly authorized the Union to bargain on his behalf and Wood made no attempt to revoke their authorization".

> "Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed."

Second, the promulgation of such a rule would provoke strong temptation to abuse. Union representatives might feel free to use virtually any means to obtain signatures and only afterwards tell the employees about the card's true purposes. Thus if at the time of its demand for recognition it had a majority, the union under this theory could claim that the cards were valid because if the employees did not intend to authorize union representation they would have revoked their cards after hearing the post-signing representations.

If post-signing declarations may be used to cure defects in the solicitation process, we think it is incumbent upon the General Counsel to prove not only that the statements were made but also that the signers understood and intended to adopt the post-signing explanations. No such attempt was made here. After the cards were signed, the men waited for the arrival of Mills who explained the purposes for which the cards might be used. There was no evidence that the men understood or even listened to what Mills was saying.[17]

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[17] Indeed the evidence points to the opposite conclusion. The prime Union leader within the plant, Carlton Hornsby, testified that he heard no mention of the fact that a letter requesting recognition would be sent to the Company, a statement which Mills was credited as having made.

There was no evidence that the men were told that they could revoke the cards even if they had possessed "rare strength of character". In short, we apply the rule expressed in *N.L.R.B. v. Lake Butler Apparel Co.*, supra, and *Engineers & Fabricators, Inc. v. N.L.R.B.*, supra, which states that "the burden of proof is on the General Counsel, *once* representation cards are challenged because of misrepresentation in their procurement and proof is offered which substantiates the challenge, to show that the subjective intent to authorize union representation was not vitiated by the misrepresentation". Here, the ambiguous nature of the cards and the representations by Harmon warranted an inquiry into the subjective intent of the employees. Thus we conclude that the General Counsel failed to sustain its burden of proving that the men understood what they were signing because there was no probing into the subjective intent of the employees to determine if the workers comprehended and accepted the post-signing declarations of the Union solicitors. On this record the Board should have inquired into the subjective intent of at least two employees, Wood and Griffin.[18]

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[18]The Board held that the Union validly acquired the support of nine of fourteen workers. Thus with the elimination of Wood's and Griffin's cards the count is reduced from nine to five to seven to seven. Consequently the Union did not have a majority at the time of its demand and the Company had no duty to bargain. Since the Union is without a majority it would be superfluous to consider the validity of other authorization cards. As a result we need not discuss either the validity of Green's card or the Board's contention that consideration of this specific objection raised for the first time on appeal would be in violation of 29 USC, §160(e) which states in pertinent part that "No objection that has not been urged

The Trial Examiner specifically found that Wood would have voted for the Company even if there had been no unfair labor practices. In fact, the Trial Examiner found Wood to be so company-biased that he discredited his testimony. Yet the Board, steadfastly adhering to the *Joy Silk* doctrine that the thoughts and afterthoughts of employees cannot negate the overt act of signing an authorization card, came to the incongruous conclusion that Wood had authorized Union representation in spite of his company bias. Given the misrepresentative circumstances in which Wood's signature was obtained, the Board erred in failing to inquire into his subjective intent.

Admittedly Griffin's situation is somewhat different. In addition to the speeches of Hornsby and Mills which were delivered in the parking lot of the "Idle Hour" tavern, Griffin had the benefit of Hornsby's statement made on the following day that a letter demanding recognition would arrive in two or three days. While such evidence has clear weight it is far from conclusive as to Griffin's subjective intent because there was no showing that Griffin understood and accepted Hornsby's remarks to stand for the proposition that the cards would be used to request recognition without an election.[19] Similarly the fact that

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before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[19]The following testimony reflects the nature of Griffin's intent and the treatment given it by the Trial Examiner in his intermediate order:

Wood and Griffin signed authorization cards in a second organization drive contributes little to the question of the men's intent. Even if the men intended to authorize Union representation on the second signing, that fact is simply not conclusive as to what the men intended when they signed the cards originally. It may well be that the men changed their minds because of the hostility displayed by the Company during the first organization drive.

In conclusion, we hold that where proof of misrepresentation during the presigning solicitation has been made, post-signing statements cannot be used to cure the defects unless there is a clear showing by the

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"Q. Dennis, why did you tell Mr. Mraz that you'd signed the card the first time?

A. Well, because I was with the Company and I just wanted to keep everybody happy in the shop.

Q. When you signed your card the first time before the election, were you in favor of having the Union come in?

A. No, sir, I just signed it to keep harmony in the shop.

Q. As an offer of proof, Dennis, I would ask you on the occasion of your signing the first card would you have signed that card to bring in the Union without having an election?

A. No, sir."

The Trial Examiner stated in his order:

"With respect to Griffin's subjective state of mind at the time he signed the card, I adhere to my ruling rejecting the Company's attempt to inquire in that area, and I place no weight on Griffin's testimony on that matter even where he answered without objection from General Counsel. As stated in *Joy Silk Mills* 'an employee's thoughts (or afterthoughts) as to why he signed a Union card and what he thought that card meant, cannot negative the overt action of having signed a card designating the Union as bargaining agent.' "

General Counsel that the subjective intent of the signers was to authorize union representation. Since the General Counsel did not make such a showing here, it failed to sustain its burden of proving that the signers did what they would have done in an election. Consequently there is no substantial evidence to support the Board's conclusion that a majority of the employees had authorized the Union to be their collective bargaining agent.

There being no basis for finding a refusal to bargain other than the Board's reliance upon the signing of the cards, the order of the Board requiring bargaining with the Union cannot be enforced. Since we cannot enforce the Board's finding that the Company had a duty to bargain we need not consider the question of good faith refusal.

As to the 8 (a) (1) violations, the orders of the Board are enforced. As to the alleged 8 (a) (5) violation, the portion of the order requiring the Company to bargain with the Union will not be enforced.

The order is ENFORCED IN PART AND DENIED IN PART.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

ATLAS ENGINE WORKS, INC. *v.* NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 598. Decided June 23, 1969.*

Certiorari granted; No. 598, 396 F. 2d 775; No. 906, 404 F. 2d 1097; No. 1213, 406 F. 2d 17; No. 1273, 404 F. 2d 105, vacated and remanded.

Robert B. Gosline for petitioner in No. 598. *Robert Lewis* for petitioner in No. 906. *Laurent K. Varnum* for petitioner in No. 1213. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for petitioner in No. 1273.

Solicitor General Griswold and *Messrs. Ordman, Manoli,* and *Come* for respondent in Nos. 598 and 906. *Solicitor General Griswold* and *Mr. Ordman* for respondent in No. 1213. *William J. Larkin 2d* for respondent in No. 1273.

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments are vacated, and the cases are remanded to the respective United States Courts of Appeals with instructions to remand the cases to the National Labor Relations Board for further consideration in light of *NLRB* v. *Gissel Packing Co., Inc., ante,* p. 575.

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*Together with No. 906, *Thrift Drug Co. of Pennsylvania* v. *National Labor Relations Board,* and No. 1213, *Lou De Young's Market Basket, Inc.* v. *National Labor Relations Board,* also on petitions for writs of certiorari to the United States Court of Appeals for the Sixth Circuit; and No. 1273, *National Labor Relations Board* v. *Pembek Oil Corp.,* on petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.